(10)

No. 00-1519-CFY Title: United States, Petitioner
v.
Ralph Arvizu

Docketed: April 3, 2001 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 15 2001	Application (00A717) to extend the time to file a petition for a writ of certiorari from March 1, 2001 to March 31, 2001, submitted to Justice O'Connor.
	Feb 16 2001	Application (00A717) granted by Justice O'Connor extending the time to file until March 31, 2001.
	Apr 2 2001	Petition for writ of certiorari filed. (Response due May 3, 2001)
	May 3 2001	Brief of respondent Ralph Arvizu in opposition filed.
	May 3 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	May 14 2001	Reply brief of petitioner United States filed.
	May 15 2001	DISTRIBUTED for Conference of May 31, 2001
	Jun 4 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Jun 4 2001	Petition GRANTED. SET FOR ARGUMENT November 27, 2001. **********
	Jun 18 2001	Motion of respondent for appointment of counsel filed.
	Jun 29 2001	Motion for appointment of counsel GRANTED and it is ordered that Victoria A. Brambl, Esq., of Tucson, Arizona, is appointed to serve as counsel for the respondent in this case.
	Jul 19 2001	Joint appendix filed.
	Jul 19 2001	Brief of petitioner United States filed.
	Aug 23 2001	Brief of respondent Ralph Arvizu filed.
	Aug 23 2001	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Aug 23 2001	Brief amicus curiae of DKT Liberty Project filed.
	Sep 24 2001	Reply brief of petitioner United States filed.
	Sep 26 2001	CIRCULATED.
	Oct 3 2001	Record filed.
	Nov 27 2001	ARGUED.

Supreme Court, U.S.
FILED
APR - 2 2001

No. 001510

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously departed from the totality-of-the-circumstances test that governs reasonable-suspicion determinations under the Fourth Amendment by holding that seven facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law.

2. Whether, under the totality-of-the-circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-20a) is reported at 232 F.3d 1241. The oral decision of the district court (App., *infra*, 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on

December 1, 2000 (App., *infra*, 3a). On February 16, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 31, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following the denial of his motion to suppress evidence in the district court, respondent entered a conditional plea of guilty to the charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Respondent was sentenced to ten months' imprisonment, to be followed by three years' supervised release. The court of appeals reversed.

1. On the afternoon of January 19, 1998, Border Patrol Agent Clinton Stoddard was working at a permanent Border Patrol checkpoint at the intersection of Highway I-191 and Rucker Canyon Road, near the border town of Douglas, Arizona. The checkpoint, which is 30 miles north of the Mexican border, was open and conducting vehicle inspections. App., *infra*, 4a-5a; 12/7/98 Tr. 8-10, 12, 14. Stoddard is an experienced agent who has trained other agents on smuggling detection techniques. 12/7/98 Tr. 4-7.

At approximately 2:15 p.m., a sensor monitored by the Border Patrol detected a vehicle traveling north on Leslie Canyon Road. That road begins near the border

in Douglas and parallels both I-191, which is to the west, and the boundary of the Coronado National Forest, which is to the east. App., *infra*, 4a; see Tr. 10-11 & Exh. 40.[1] A vehicle traveling north from Douglas can use Leslie Canyon Road to bypass the Border Patrol checkpoint on I-191. App., *infra*, 5a; 12/7/98 Tr. 12. Like most of Leslie Canyon Road, the portion of road where the sensor is located is unpaved dirt. App., *infra*, 4a; 12/7/98 Tr. 13. That portion of Leslie Canyon Road is used mostly by ranchers, Forest Service personnel, and the Border Patrol. App., *infra*, 4a; 12/7/98 Tr. 12. On a typical day, the sensor detects a vehicle passing by only once every two hours or so. 12/7/98 Tr. 39-40; see App., *infra*, 5a n.5.

The fact that the sensor gave an alert at about 2:15 p.m. was significant to Stoddard because that was approximately the time at which the agents who patrolled the area around the I-191 checkpoint normally returned to the checkpoint for their 3 p.m. shift change. Smugglers commonly time their passages to coincide with a shift change because the change leaves the back roads free of Border Patrol surveillance. App., *infra*, 5a & n.6; 12/7/98 Tr. 11, 31.

Agent Stoddard left the I-191 checkpoint and drove east on Rucker Canyon Road, toward Leslie Canyon Road, to investigate the sensor report. As he drove, a second sensor located north of the first sensor reported traffic, indicating that the vehicle had turned west on Rucker Canyon Road and was coming toward Stoddard

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[1] The court of appeals incorrectly stated that Leslie Canyon Road is in the Coronado National Forest. App., *infra*, 4a. Exhibits 1A and 40, introduced into evidence at the suppression hearing, are maps that show that the road is entirely outside the national forest.

and I-191. App., *infra*, 5a. The vehicle was now headed away from recreation areas in the national forest, which can be reached by driving east on Rucker Canyon Road. 12/7/98 Tr. 14-15, 36. If the vehicle next turned right (north) onto Kuykendall Cutoff Road, it would circumvent the I-191 checkpoint and could proceed to cities such as Tucson and Phoenix with very little chance of being stopped by the Border Patrol. That route along dirt roads (north on Leslie Canyon Road paralleling I-191, west on Rucker Canyon Road away from the national forest, and then north on Kuykendall Cutoff Road before reaching the I-191 checkpoint) is "a notorious route" used by illegal aliens and drug smugglers. *Id.* at 14-16.

As Stoddard drove east on Rucker Canyon Road to intercept the vehicle coming west, he spotted a minivan. Based on the timing of the sensor alarms and the absence of any other traffic, Stoddard believed that the minivan was the vehicle that had tripped the sensors. 12/7/98 Tr. 16-17. Stoddard pulled his Border Patrol vehicle to the side of the road so that he could get a good look at the minivan when it passed. App., *infra*, 5a; 12/7/98 Tr. 17. The minivan slowed dramatically when it approached Stoddard's parked Border Patrol vehicle, cutting its speed from approximately 50 to 55 miles per hour to approximately 25 to 30 miles per hour. App., *infra*, 6a; 12/7/98 Tr. 17, 40.

Stoddard saw five people in the minivan. Respondent was driving, an adult woman was in the front seat, and three children were in the back seats. App., *infra*, 6a; 12/7/98 Tr. 17-19. Respondent appeared rigid and nervous. He gripped the steering wheel tightly, and avoided eye contact with Stoddard. App., *infra*, 6a; 12/7/98 Tr. 17-18.[2] The adult passenger also appeared nervous. 12/7/98 Tr. 18. The two children in the rearmost seat sat with their knees unusually high, as if their feet were resting on top of an object on the floor of the vehicle. App., *infra*, 6a; 12/7/98 Tr. 19.

Stoddard was familiar with the local vehicles in the area, but he did not recognize the minivan. App., *infra*, 7a; 12/7/98 Tr. 22. The minivan also was out of character for the area because most vehicles that use the dirt back roads are four-wheel drive vehicles. 12/7/98 Tr. 46. The Border Patrol had discovered a minivan smuggling drugs in the same area a few weeks earlier, and Stoddard knew that smugglers commonly use minivans to carry aliens and drugs. *Id.* at 12, 18.

Stoddard followed the minivan. All three children in the vehicle then began simultaneously waving in an abnormal manner, on and off, for about five minutes while facing forward, without ever turning around to look at Stoddard. Stoddard suspected that the waving —which he testified "wasn't in a normal pattern"—was being choreographed by the adults in the vehicle. App., *infra*, 6a; 12/7/98 Tr. 20, 43-44, 55.

After turning his blinker on, then off, then on again, respondent abruptly turned north onto Kuykendall Cutoff Road, the final turn on the route that would bypass the I-191 checkpoint. App., *infra*, 6a; 12/7/98 Tr. 20-22. Around that time, Stoddard ran a license check and learned that the vehicle was registered to an

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[2] The district court rejected as not credible respondent's assertion that he was relaxed when he saw the Border Patrol vehicle. "I find it very difficult to believe," the district court stated, "that somebody carrying 125 or 128 pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer." App., *infra*, 24a.

address in Douglas. Stoddard recognized the address as being just four blocks north of the Mexican border, on a street that smugglers frequently used as a staging area for transporting aliens and narcotics further into the United States. App., *infra*, 7a; 12/7/98 Tr. 22-23, 48-49.

Stoddard stopped the minivan. Respondent leaned out of the driver's window and greeted Stoddard excitedly. When Stoddard asked where respondent was going, respondent said he was headed to a park, but he could not remember the name of the park.[3] Stoddard observed that respondent's hands were shaking and his forehead was sweaty, even though it was January and not hot outside. App., *infra*, 7a; 12/7/98 Tr. 25-27. Stoddard asked for and received consent to search the vehicle. App., *infra*, 7a; 12/7/98 Tr. 27-28. He opened the side door, smelled marijuana, and saw a black duffel bag under the feet of the two children in the back seat. 12/7/98 Tr. 28-29. Respondent consented to a search of the duffel bag, whereupon Stoddard discovered marijuana wrapped in cellophane. Border Patrol agents later found another bag of marijuana behind the rear seat. *Id.* at 29-30. The weight of the marijuana found in the minivan was approximately 125 pounds. *Id.* at 138.

2. Respondent moved to suppress the marijuana on the ground that Stoddard lacked reasonable suspicion to stop the minivan and lacked authority to search it. After taking testimony from Stoddard, 12/7/98 Tr. 3-58, an investigator employed by respondent's counsel, *id.* at 58-82, respondent, *id.* at 82-98, and respondent's

[3] Respondent testified at the suppression hearing that he was going to a location known as Turkey Creek to meet a man whom he did not know, who would be driving a Ford pickup truck. 12/7/98 Tr. 95-96.

adult passenger (who was his sister), *id.* at 98-111, and after hearing argument on the motion, *id.* at 111-134, the district court ruled that Stoddard had reasonable suspicion to stop the minivan. Stating that the evidence had to be considered "in the context of what was going on out there and in the context of the information available to the officer," App., *infra*, 22a, the district court identified ten specific facts that supported Stoddard's suspicion of illegal activity:

> (1) The minivan was on "poorly traveled" roads that are "used to circumvent the [I-191 Border Patrol] checkpoint." *Id.* at 22a-23a; see also *id.* at 23a (Leslie Canyon Road "certainly isn't a heavily traveled road by any stretch of the imagination").
>
> (2) The minivan had passed the only recreation area in the vicinity (at Rucker Canyon Road), and the next recreation area was "quite a few miles to the north," at the Chiricahua National Monument. *Id.* at 22a. That distant recreation area was accessible by taking I-191 to I-181, which would avoid having to make a "40-mile trip at least, through a dirt road." *Ibid.*
>
> (3) The minivan appeared to slow "appreciably" when it saw Stoddard's Border Patrol vehicle. *Id.* at 23a.
>
> (4) The minivan's trip coincided with the Border Patrol's shift change, when agents return to the checkpoint and leave the area open to smugglers. *Ibid.*
>
> (5) Smugglers were known to use minivans, and the Border Patrol had recently stopped a similar

minivan in the same area with a load of marijuana. *Id.* at 23a-24a.

(6) Respondent appeared nervous and his demeanor was consistent with illegal activity. *Id.* at 24a.

(7) Stoddard, having worked in the area, did not recognize the minivan as a local vehicle. *Ibid.*

(8) The position of the children's legs suggested that there was cargo on the rear floor of the minivan. *Id.* at 24a-25a.

(9) The children waved in a "methodical," "mechanical way" without looking at Stoddard, which "was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this." *Id.* at 25a.

(10) The minivan was registered to "an often-used smuggling area." *Ibid.*

On the basis of those ten factors, collectively, the district court found that Stoddard had reasonable suspicion to stop the minivan. App., *infra*, 25a. The district court further found that respondent voluntarily consented to the search of his minivan, without any coercion by Stoddard. *Id.* at 25a-26a. The court concluded that respondent's consent extended to the duffel bags and, in any event, Stoddard had probable cause to search the bags after he smelled marijuana in the vehicle. *Id.* at 26a.

3. The court of appeals reversed.[4] The court of appeals recited established standards for determining whether reasonable suspicion exists, see App., *infra*, 8a-11a, but indicated concern that the "fact-specific weighing of circumstances" required by these standards "introduces a troubling degree of uncertainty and unpredictability into the process" of making reasonable suspicion determinations. *Id.* at 12a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinski, J., concurring), cert. denied, 121 S. Ct. 211 (2000)). Accordingly, the court of appeals was of the view that "[w]hat factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated." *Id.* at 11a. To that end, the court stated that it intended to use this case "to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Id.* at 12a.

Specifically, the court of appeals held that the district court had "improperly relied on" seven factors that were "neither relevant nor appropriate to a reasonable suspicion analysis in this case" and should not have been considered "as a matter of law." App., *infra*, 12a, 14a. *First*, "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and cannot

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[4] The court of appeals issued its initial opinion on July 7, 2000. See App., *infra*, 1a. On December 1, 2000, the court revised its opinion and, based on the amended opinion, denied the government's petition for rehearing or rehearing en banc. *Id.* at 1a-20a. The changes made to the initial opinion are identified at pages 1a to 3a of the Appendix to this petition.

contribute to reasonable suspicion of unlawful activity. *Ibid.* *Second*, respondent's failure to acknowledge Stoddard as he drove by "provides no support for Stoddard's reasonable suspicion determination." *Id.* at 13a. *Third*, the children's "odd act" of waving to Stoddard without looking at him "carries no weight in the reasonable suspicion calculus." *Id.* at 13a-14a. *Fourth*, "[t]he fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion." *Id.* at 14a. *Fifth*, the officer's failure to recognize the minivan as a local vehicle "fails to contribute to the reasonable suspicion calculus" because "the area in question is one that is used for many purposes by different kinds of people." *Ibid.* *Sixth*, the fact that the minivan was "registered to an address in a block notorious for smuggling is also of no significance." *Id.* at 15a. *Seventh*, and finally, the appearance that there was cargo on the floor of a minivan that was carrying adults and children was "all too common to be of any relevance." *Id.* at 17a.

The court of appeals deemed only three factors relevant to its reasonable suspicion analysis: the road used by the minivan was sometimes used by smugglers; the minivan was traveling around the time of the Border Patrol's shift change; and, as a general matter, smugglers sometimes use minivans. App., *infra*, 17a. The court concluded that those three factors, considered in isolation from the other factors that the court had ruled were irrelevant, did not "constitute reasonable suspicion either singly or collectively." *Ibid.* The route taken by respondent, in the view of the court, "is of only moderate significance" because the road "is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. The shift change, the court stated, "is of little

probative value" because the minivan tripped the first sensor approximately 45 minutes before the shift change. *Id.* at 18a. And minivans, the court concluded, "although sometimes used by smugglers, are among the best-selling family car models in the United States." *Ibid.*

Based on that analysis, the court of appeals held that the stop was unlawful. It then held that respondent's consent to Stoddard's search of the vehicle was tainted by the illegal stop. App., *infra*, 18a-19a. The court of appeals therefore reversed the district court's denial of respondent's motion to suppress evidence and remanded the case to the district court. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

The court of appeals has departed fundamentally from this Court's totality-of-the-circumstances test for determining whether reasonable suspicion exists. By declaring as a matter of law that law enforcement officers may not consider certain facts when forming a suspicion of illegal activity, the court of appeals has created a direct conflict with decisions of this Court and other courts of appeals, incorrectly excluded critical evidence in this case, and undermined effective law enforcement in the Ninth Circuit.

1. This Court's decisions leave no doubt that reasonable-suspicion analysis under the Fourth Amendment requires consideration of the totality of the circumstances surrounding an officer's decision to make a particular stop. Twice before, the Ninth Circuit has attempted to graft bright-line rules onto that necessarily fact-specific inquiry. Twice before, this Court has rejected the Ninth Circuit's approach.

a. In *United States* v. *Cortez*, 449 U.S. 411 (1981), this Court rejected the Ninth Circuit's view that rea-

sonable suspicion to stop a vehicle near the border requires "something * * * in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity," a test that led the court of appeals to invalidate a stop because the activity observed by Border Patrol agents was consistent with "innocent inferences." *United States* v. *Cortez*, 595 F.2d 505, 508 (9th Cir. 1979). In reversing that holding, and finding that reasonable suspicion existed in that case, the Court explained that "the essence" of the reasonable-suspicion test "is that the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. The Court emphasized that all of the circumstances known to the officer must be considered, and those circumstances must be assessed in light of the "inferences and deductions" that a trained law enforcement officer properly may make. *Id.* at 418. The Court made clear that the question is not, as the Ninth Circuit had suggested, whether some specific fact "affirmatively suggests particular criminal activity," 595 F.2d at 508 (emphasis omitted), but "whether, based upon the whole picture, [the officer] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," 449 U.S. at 421-422.

Six years after *Cortez*, in *United States* v. *Sokolow*, 490 U.S. 1 (1989), the Court once again reviewed an attempt by the Ninth Circuit to narrow the totality-of-the-circumstances test. *Sokolow* involved a stop of an airline passenger at an airport, on suspicion of being a drug courier. See *id.* at 4-5. The district court denied a motion to suppress the drugs found by law enforcement agents, and the court of appeals reversed. *Id.* at 5-6. The court of appeals held that facts bearing on reasonable suspicion are appropriately divided into two

categories: "facts describing 'ongoing criminal activity,' such as the use of an alias or evasive movement through an airport," and "facts describing 'personal characteristics' of drug couriers, such as [a] cash payment for tickets, a short trip to a major source city for drugs, nervousness, type of attire, and unchecked luggage." *Id.* at 6 (quoting *United States* v. *Sokolow*, 831 F.2d 1413, 1419, 1420 (9th Cir. 1987)). In the court of appeals' view, facts in the second category are relevant to reasonable suspicion only if (1) they are accompanied by facts in the first category, and (2) the government shows "that the combination of facts at issue d[oes] not describe the behavior of 'significant numbers of innocent persons.'" *Ibid.* (quoting 831 F.2d at 1420).

This Court rejected the Ninth Circuit's effort to disaggregate and categorize the facts surrounding an officer's suspicion of illegal activity. "The concept of reasonable suspicion," the Court stated, "is not 'readily, or even usefully, reduced to a neat set of legal rules.'" 490 U.S. at 7 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). To the contrary, the Ninth Circuit's "effort to refine and elaborate the requirements of 'reasonable suspicion'" created "unnecessary difficulty" in applying the Fourth Amendment. *Id.* at 7-8. Under the proper analysis, a factor may support reasonable suspicion even though it is "quite consistent with innocent travel" if considered without reference to the surrounding facts. *Id.* at 9. Applying those principles, this Court reversed and held that the agents had sufficient grounds to stop the airline passenger. *Id.* at 8-11.

More recent decisions of this Court are to the same effect. In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court reaffirmed that reasonable suspicion is a "fluid," "commonsense" concept that takes its substantive content from contextual application, not legal rules.

Id. at 695-696; see *id.* at 696 ("[e]ach case is to be decided on its own facts and circumstances") (internal quotation marks omitted). Because reasonable-suspicion analysis requires a court to analyze a "mosaic" of facts, one application of the standard will rarely control another. *Id.* at 698. Furthermore, the Court held, although reasonable-suspicion determinations are subject to de novo appellate review, a court of appeals should "give due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers." *Id.* at 699.

In *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), the Court built on the same principle. In that case, which involved a stop of an individual who ran when he spotted police officers in a high-crime area, the Court once again considered whether lawful conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless contribute to reasonable suspicion. *Id.* at 125. The Court rejected the holding of the Illinois Supreme Court that some conduct must be considered innocent as a matter of law. See *id.* at 122-123. Instead, the Court reaffirmed that an officer may give weight to ambiguous conduct when making "commonsense judgments and inferences" about the likelihood that illegal activity is occurring. *Id.* at 125 (citing, *inter alia*, *Cortez*).

Notwithstanding this Court's repeated and consistent instruction, the Ninth Circuit has again held that the reasonable suspicion inquiry does not allow an investigating officer to consider all the circumstances known to him. By "attempt[ing] * * * to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops," App., *infra*, 12a, the court of appeals articulated precisely the sort of inflexible legal rules that are

neither useful nor permissible under the rubric of reasonable suspicion. See *Sokolow*, 490 U.S. at 7. By ruling that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable-suspicion analysis in this case," App., *infra*, 12a, the court of appeals departed from the cardinal principle that reasonable-suspicion analysis requires a court to view "the whole picture" seen by the officer. *Cortez*, 449 U.S. at 417. And, by holding that some behavior, such as slowing down a vehicle upon seeing a law enforcement officer or carrying cargo in a family van, are too common and innocent *ever* to contribute to reasonable suspicion, App., *infra*, 12a, 16a-17a, the court of appeals violated the rule that typically innocent conduct may contribute to reasonable suspicion in light of the surrounding circumstances. See *Sokolow*, 490 U.S. at 8-10; *Wardlow*, 528 U.S. at 125.

The court of appeals also erred by substituting its own assessment of the facts for the inferences drawn by the officer on the scene and the local district court. For example, the district court agreed with Stoddard that the seemingly coached waving by the children in respondent's vehicle (which Stoddard demonstrated at the suppression hearing, see 12/7/98 Tr. 20) was suspicious; the court of appeals should have accorded that finding "due weight." *Ornelas*, 517 U.S. at 699, 700; see App., *infra*, 25a. Yet the court of appeals excluded that factor from its analysis without discussing the district court's finding. *Id.* at 13a-14a. Similarly, the federal judge sitting in the District of Arizona was well-positioned to determine, in light of "[t]he background facts," *Ornelas*, 517 U.S. at 700, that respondent's vehicle was not following a logical route to any established recreation area. App., *infra*, 22a. The court of appeals erroneously ignored that finding, and relied instead on

the general proposition that "the road in question is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. Such disregard for the "inferences drawn from th[e] facts by resident judges and local law enforcement officers" directly contravenes this Court's holding in *Ornelas*, 517 U.S. at 699; see *ibid.* (noting that "[a] trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise.").

b. The court of appeals' departure from the totality-of-the-circumstances approach, and its attempt to put certain fact patterns off-limits, has brought it into conflict with other courts of appeals. For instance, the Fifth Circuit and the Tenth Circuit, which share jurisdiction over Mexican border areas with the Ninth Circuit, both have held that a Border Patrol agent may give weight to a driver's reduction in speed upon seeing a Border Patrol vehicle.[5] The decision below, however, announces the contrary rule that "slowing down after spotting a law enforcement vehicle is * * * in no way indicative of criminal activity" and may not be considered. App., *infra*, 12a.

So too, the Fifth and Tenth Circuits have deemed it relevant that a Border Patrol agent did not recognize a

[5] See *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998) ("noticeable deceleration in the presence of a patrol car can contribute to reasonable suspicion"); *United States* v. *Barron-Cabrera*, 119 F.3d 1454, 1462 (10th Cir. 1997) (slowing to nearly 10 miles per hour below the speed limit supports reasonable suspicion); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1486 (10th Cir. 1994) ("maintaining a noticeably slow speed in the presence of a police officer may suggest nervousness" and support reasonable suspicion).

vehicle as being local. See *United States* v. *Zapata-Ibarra*, 212 F.3d 877, 883 (5th Cir.), cert. denied, 121 S. Ct. 412 (2000); *United States* v. *Ceniceros*, 204 F.3d 581, 583-585 (5th Cir. 2000); *United States* v. *Gonzalez*, 190 F.3d 668, 672 (5th Cir. 1999); *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998); *United States* v. *Leyba*, 627 F.2d 1059, 1063-1064 (10th Cir. 1980). The Ninth Circuit, by contrast, dismissed Stoddard's failure to recognize respondent's minivan as entirely irrelevant, because (as will almost always be the case) outsiders sometimes have legitimate reasons to come into the area where the stop occurred. App., *infra*, 14a.

It also is well-established that the apparent presence of a substantial amount of cargo in a vehicle can support a Border Patrol agent's reasonable suspicion of illegal smuggling activity. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *United States* v. *Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001); *United States* v. *Cruz-Hernandez*, 62 F.3d 1353, 1355 (11th Cir. 1995); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1483-1484 (10th Cir. 1994); *United States* v. *Anderson*, 923 F.2d 450, 457 (6th Cir.), cert. denied, 499 U.S. 980 and 500 U.S. 936 (1991). The court of appeals nevertheless deemed that factor wholly irrelevant, stating that a minivan carrying adults and children presents "an entirely different situation." App., *infra*, 16a-17a. The court's minivan exception ignores that smugglers have been known to use minivans, *id.* at 17a, and there is no suggestion in the record that smugglers never carry children. The presence of cargo, while not

in itself criminal, must be assessed in light of all the facts known to the officer.[6]

Although those multiple conflicts between the Ninth Circuit's decision in this case and the holdings of sister circuits warrant resolution by this Court, the critical point is that such conflicts are the inevitable result of the Ninth Circuit's attempt to exclude whole categories of facts from the reasonable suspicion inquiry. Correcting the Ninth Circuit's fundamental analytic error is the appropriate way to resolve the specific conflicts described above, and to prevent the development of related conflicts as the Ninth Circuit applies its incorrect approach to other fact patterns.

2. Because of its methodological errors, the court of appeals reached the wrong result in this case. The court of appeals never purported to consider "the whole picture" seen by Agent Stoddard. *Cortez*, 449 U.S. at 417. As discussed above, the court of appeals improperly excluded from its analysis numerous relevant considerations, such as respondent's dramatic reduction in speed upon seeing a Border Patrol vehicle, respondent's visible nervousness,[7] the children's unnatural

[6] Unlike the court of appeals, the district court considered Stoddard's observation that the minivan appeared to have cargo in light of all the facts known to Stoddard. App., *infra*, 25a ("Could have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity.").

[7] The court of appeals characterized the evidence about respondent's nervous demeanor as a involving a mere "failure to acknowledge Agent Stoddard." App., *infra*, 13a. Stoddard actually testified that respondent "became stiff and rigid" and appeared nervous when he passed the Border Patrol vehicle. 12/7/98 Tr. 17-18, 42-43. The district court found Stoddard's testimony credible. App., *infra*, 24a, 26a-27a. And apparent nervousness indisputably was relevant to the reasonable suspicion analysis. See *Wardlow*, 528 U.S. at 124 ("[N]ervous, evasive behavior is a pertinent factor

waving, the registration of the minivan to a non-local address that is very close to the Mexican border and on a street that is used as a staging area for smuggling, and indications that there was bulky cargo on the floor of the minivan. The court of appeals also overlooked the district court's finding that respondent was not headed toward nearby recreation areas and was not following a sensible route to recreation areas farther north. App., *infra*, 22a. That finding, considered together with Stoddard's failure to recognize the minivan as being local traffic, see *id.* at 24a, left no obvious explanation for respondent's appearance on the dirt roads of a sparsely populated area—except that respondent was following a "notorious" smuggling route to avoid the I-191 checkpoint. 12/7/98 Tr. 15.

The court of appeals likewise erred in attaching "little probative value" to the fact that respondent's minivan triggered the first sensor on Leslie Canyon Road 45 minutes before the Border Patrol's scheduled shift change. App., *infra*, 18a. The court of appeals reasoned that the fact that there would be a shift

in determining reasonable suspicion."); *United States* v. *Sowers*, 136 F.3d 24, 27 (1st Cir.) (nervousness following traffic stop), cert. denied, 525 U.S. 841 (1998); *United States* v. *Massie*, 65 F.3d 843, 849 (10th Cir. 1995) (nervousness at border checkpoint); *Cruz-Hernandez*, 62 F.3d at 1356 n.2 ("A driver who glances 'repeatedly and nervously' at a border patrol agent as the driver passes * * * gives the agent cause to consider the behavior suspicious."); *United States* v. *Bloomfield*, 40 F.3d 910, 919 n.10 (8th Cir. 1994) (en banc) ("[W]e have often held that nervousness and other 'subjective perceptions' [of law enforcement officers] are valid factors supporting reasonable suspicion."), cert. denied, 514 U.S. 1113 (1995); *United States* v. *McCarthur*, 6 F.3d 1270, 1278 (7th Cir. 1993) (train passenger's nervousness and shaky hands); *United States* v. *Glover*, 957 F.2d 1004, 1010 (2d Cir. 1992) (sweating and nervous looking-around upon exiting bus).

change in 45 minutes did not "add much to the mix." *Ibid.* But that reasoning ignored the time it takes agents to drive back to the checkpoint for a shift change. Consistent with Agent Stoddard's testimony, see 12/7/98 Tr. 11, 31, the district court found that the sensor was triggered at approximately the same time that "agents are returning to the checkpoint [for the 3 p.m. shift change,] leaving this area open" to smugglers. App., *infra*, 23a.

The question before the court of appeals was not whether the facts known to Stoddard when he stopped the minivan constituted probable cause for an arrest or a search (they would not have), or whether the factors *individually* supported reasonable suspicion or were flatly inconsistent with innocent travel, see *Wardlow*, 528 U.S. at 125. The question, instead, was whether the totality of the circumstances identified by Stoddard and the district court justified a brief stop of the vehicle to investigate. They did.

3. Correcting the court of appeals' erroneous narrowing of the reasonable-suspicion inquiry is a matter of great importance to law enforcement, and particularly to the national effort to halt smuggling and transportation of illegal aliens away from border areas.

This Court has recognized "the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country." *Cortez*, 449 U.S. at 418-419. We are advised by the Immigration and Naturalization Service that in Fiscal Year 2000, federal agents conducted nearly 438 million inspections along the land borders

with Canada and Mexico, and there were more than 1.6 million apprehensions by the Border Patrol.[8]

Because the Border Patrol lacks constitutional authority to conduct random searches of vehicles that may be carrying illegal aliens or narcotics from border areas into the interior of the country, it must rely heavily upon its powers to inspect vehicles at fixed checkpoints in the vicinity of the border, and to make those checkpoints effective by stopping suspicious vehicles that circumvent them. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 268, 272-273 (1973). If facts that suggest smuggling activity to a trained officer under the particular circumstances can be disaggregated and individually dismissed as they have been in this case, then the Border Patrol's ability to prevent smuggling and evasion of its checkpoints will be greatly compromised.

The court of appeals' approach, moreover, will undermine, rather than further, the court's stated objective of reducing the "uncertainty and unpredictability" associated with application of the reasonable-suspicion standard in all areas of law enforcement. App., *infra*, 12a (internal quotation marks omitted).[9] As this Court

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[8] Two-thirds of the Border Patrol's apprehensions occurred within the Ninth Circuit. At its southern edge, the Ninth Circuit contains the busiest border crossing in the world (at San Diego, where 125,000 people cross every day). At its northern edge, it contains the border in Washington State, which logged 5.5 million recorded crossings in 1999.

[9] The court of appeals' parsing of the reasonable suspicion analysis into a series of hurdles that law enforcement must separately surmount is not an aberration, and it is not limited to the border context. In several decisions since *Sokolow*, the Ninth Circuit, using the same approach, has eliminated factors from consideration in the reasonable suspicion analysis as a matter of

has held, "neat * * * legal rules * * * create[] unnecessary difficulty" in applying reasonable-suspicion analysis. *Sokolow*, 490 U.S. at 7. Confirming the validity of that conclusion, the rules articulated by the court of appeals in this case prevent law enforcement officers from relying on their own assessments of the circumstances before them, as seen through the lens of their training and experience. Whenever a fact observed by an officer already has been found irrelevant as a matter of law under the Ninth Circuit's approach, the officer must attempt to exclude the fact from his or her split-second assessment of the situation, and is left to speculate about what degree of suspicion would exist in the absence of the forbidden fact. Officers must also attempt to anticipate whether other factors they deem significant under the totality of the circumstances might fail an ill-defined standard of "sufficient" relevance when isolated from the surrounding facts. The court of appeals' approach thus requires officers to ignore facts that, based on their training and experience, contribute to reasonable suspicion. The appellate court's substitution of "library analysis" for "commonsense conclusions * * * by those versed in

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law. See *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446 (1994) ("[A] driver's failure to look at the Border Patrol cannot weigh in the balance of whether there existed reasonable suspicion for a stop."); *United States* v. *Thomas*, 211 F.3d 1186, 1191 (2000) (marijuana bales cannot make a distinctive sound when thrown); *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1131-1136 (en banc) (individual's Hispanic appearance and looking at a law enforcement vehicle in a rear view mirror may not be considered), cert. denied, 121 S. Ct. 211 (2000). This case, however, is unique inasmuch as the court of appeals expressly sought to provide law enforcement officers with guidance that would apply under the full range of circumstances. See App., *infra*, 11a-12a.

the field of law enforcement," *Cortez*, 449 U.S. at 418, defies sound logic as well as this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10229
D.C. No. CR-98-00157-FRZ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RALPH ARVIZU, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Arizona
FRANK R. ZAPATA, District Judge, Presiding

Argued and Submitted
March 15, 2000—San Francisco, California

[Filed July 7, 2000
Amended December 1, 2000]

ORDER

Before: HENRY A. POLITZ,[1] STEPHEN REINHARDT, and MICHAEL DALY HAWKINS, Circuit Judges.

Opinion by Judge Reinhardt

* * * * *

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[1] The Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

The Opinion filed July 7, 2000 is amended as follows:

1. Slip op. page 7483, immediately following the first full paragraph, insert the following paragraph:

> "'What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it.' *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J. concurring). Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here."

2. Slip op. page 7483, in the sentence beginning "In reaching our conclusion" at the beginning of the second full paragraph, add the words "in this case" after the words "are neither relevant nor appropriate to a reasonable suspicion analysis . . . ."

3. Slip op. page 7485, in the second full paragraph, delete the first sentence which begins "As we have previously held," and replace it with the following:

> "As we have previously held, 'factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law.'

> *Montero-Camargo*, 208 F.3d at 1132 (citation omitted)."

4. Slip op. page 7485, in the second full paragraph, in the sentence beginning "An examination of four additional factors," replace the words "too fall in this category" with the words "have little or no weight under the circumstances."

5. Slip op. page 7488, in the first sentence, add the words "in this case" after the words "are *not* relevant . . . ."

With those amendments, the panel has voted unanimously to deny the Petition for Rehearing; Judges Reinhardt and Hawkins have voted to deny the Petition for Rehearing En Banc, and Judge Politz has so recommended. The full court was advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote on that petition. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

OPINION

REINHARDT, Circuit Judge:

Ralph Arvizu appeals from the district court's denial of his motion to suppress marijuana found in his van by a border patrol agent. Arvizu raises two issues before this court: first, whether the stop of his van by a Border Patrol agent was justified by reasonable suspicion; and second, whether he validly consented to the subsequent search of his van. Because the district court erred in finding that the stop was justified by reasonable suspicion, we reverse.

1. ***Factual Background***

The events in question took place on the afternoon of January 19, 1998 on Leslie Canyon Road near Douglas, Arizona. Leslie Canyon Road is a largely unpaved, flat, and well-maintained road in the Coronado National Forest that parallels Highway 191. The road, which runs north south, begins at Highway 80 and ends at Rucker Canyon Road. Although Border Patrol Agent Stoddard asserted that the road is rarely travelled by anyone other than ranchers and forest service personnel and is "very desolate," at its southern end, it is paved for about ten miles, and there are residences on both sides.[2] Moreover, there is a national forest in the area, as well as the Chiricahua National Monument, both of which attract a number of visitors. There are also campgrounds and picnic areas around Rucker Canyon.[3] An investigator for the defense who had lived in Douglas for four years testified that people who live in Douglas frequently use the area for recreation. There are also a number of communities in the area, and for those heading towards the ones that are situated along the roadway between 191 and 186 from Douglas, driving along Leslie Canyon Road is shorter than driving out to I-191 and driving north.

The Douglas, Arizona border station is located about 30 miles from the border on the highway at the intersection of I-191 and Rucker Canyon Road. The station is not operational every day of the year, although on

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[2] There are also homes around the nearby Hunt Canyon, "all along" Highway 191 and along the road leading to the Chiricahua National Monument. The community of Sunizona, with schools and homes, is also on I-191.

[3] In particular, there is a Boy Scouts camp around Rucker Canyon, and a number of people use the area for biking.

January 19 it was. On that occasion, Border Patrol Agent Stoddard was working at the Douglas station.[4] At about 2:15 p.m. that afternoon, a sensor alerted him to the fact that a car was travelling north on Leslie Canyon Road.[5] Stoddard testified that this made him suspicious for three reasons: first, the timing—the car passed by around 2 p.m. and officers change shifts at 3 p.m. According to Officer Stoddard, smugglers often try to synchronize their movements with shift changes.[6] Second, cars travelling north sometimes use the surrounding, unpaved roads to bypass the station. Third, another officer had stopped a minivan heading north on that road a month earlier and had found marijuana.

His curiosity piqued, Stoddard drove east on Rucker Canyon Road to intersect with Leslie Canyon Road. As he drove, he received another report of sensor activity, indicating that the vehicle was heading west on Rucker from Leslie Canyon. After Stoddard passed Kuykendall Road, he noticed a Toyota minivan approaching him in a cloud of dust. Stoddard proceeded to pull over to the side of the road to observe the minivan as it approached. Although he did not have a radar gun,

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[4] At the suppression hearing, Stoddard testified that he had been assigned to the Douglas station for over two years. He estimated that he found illegal aliens in approximately 50 stops made while he was on roving patrol during those years. On cross-examination, however, he admitted that he had never made any drug-related stops in the area.

[5] On cross-examination, Stoddard estimated that the sensors went off at least four times in each eight-hour shift. In other words, according to Stoddard, approximately 4380 cars pass by every year. The roughly 50 stops in which Agent Stoddard was involved over a period of two years and in which some violation of the law were found represent approximately 1% of this number.

[6] At that time, there were three shift changes a day.

the agent guessed that the van was travelling at 50 to 55 miles per hour when he first spotted it. According to Stoddard, the minivan slowed as it neared his car. In the minivan was Ralph Arvizu, accompanied by his sister, Julie Reyes, and her three children—Julisa, Renato, and Guillermo.

As the Toyota passed, Stoddard observed the two adults in the front, and three children in the back. According to Stoddard, the driver appeared rigid and nervous. Stoddard based this conclusion on the fact that Arvizu had stiff posture, kept both hands on the steering wheel, and did not acknowledge him. According to Stoddard, this was unusual because drivers in the area habitually "give us a friendly wave." Stoddard also noticed that the knees of the two children sitting in the very back seat were higher than normal, as if their feet were resting on some object placed below the seat.

As the minivan passed, Stoddard decided to follow it. As he did, the children began to wave. According to Stoddard, this seemed odd because the children did not turn around to wave at him; rather, they sat in their seats and continued to face forward. The "waving" continued off and on for about four to five minutes. Based on this, Stoddard believed that the children had been instructed to wave at him by the adults in the front seat.

As the two cars approached the intersection with Kuykendall Road, Stoddard noticed that the Toyota's right turn signal was flashing. It was turned off briefly, but was turned on again shortly before the intersection. The Toyota then turned on to Kuykendall, an action which Stoddard also found suspicious because Kuykendall was the last road a car would take to avoid the border station on Highway 191. (Stoddard also found it

suspicious that he did not recognize the vehicle in question, although he conceded that tourists visited the area to see the forest and national monument.)

At this point, Stoddard ran a vehicle registration check and discovered that the van's license plates were valid, and that the car was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. At the suppression hearing, Stoddard testified that the neighborhood in which 403 4th Street was located was "one of the most notorious areas" for drug and alien smuggling.[7] On cross-examination, Stoddard conceded that he had no information about smuggling activities either at 403 4th Street in particular or on the part of Leticia Arvizu, in whose name the minivan was registered.

At this point, Stoddard decided to stop the van. As he approached the driver's side, he noticed that there was something underneath the children's feet. As Stoddard approached the Toyota, Arvizu leaned out the window and said "Good morning, officer. How are you doing?" According to Stoddard, Arvizu appeared nervous, and did not remember the name of the park to which he was driving. When Stoddard asked Arvizu about his citizenship, Arvizu replied that he was in fact an American citizen, as were all of the minivan's occupants. When Stoddard asked if Arvizu had anything or anyone hidden in the van, Arvizu said no. Nevertheless, Stoddard asked if he could look around the van, a request which Arvizu said he interpreted as a request to look around the outside of the vehicle, not to look inside. (At the suppression hearing, both Arvizu and his

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[7] On cross-examination, Stoddard explained that the "general area" was one in which aliens were often stashed before being transported north.

sister testified that Stoddard had his hand on his gun when he approached the vehicle and asked to look around. Stoddard denied this.) Stoddard did not tell Arvizu that he had a right to refuse, nor did he read Arvizu his *Miranda* rights. When Arvizu agreed to let Stoddard look around, the agent walked around to the passenger's side and opened the sliding door. Stoddard testified that as he did so, he saw a black duffel bag and smelled marijuana. Stoddard proceeded to open the bag and discovered marijuana inside.

Arvizu was charged with possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). At a suppression hearing, Arvizu argued first, that Stoddard did not have reasonable suspicion to stop the minivan, and second, that he did not give voluntary consent to the search of his van. The district court rejected both arguments and denied the motion to suppress. Arvizu then entered a conditional guilty plea, under which he reserved the right to appeal the denial of his motion to suppress. This appeal followed.

2. *Legal Background*

In order to satisfy the Fourth Amendment's strictures, an investigatory stop may be made only if the officer in question has "a reasonable suspicion supported by articulable facts that criminal activity may be afoot . . . ." *United States* v. *Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989) (internal quotation omitted) (citing *Terry* v. *Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968)). In determining whether reasonable suspicion exists, we must take into account the totality of the circumstances. *Sokolow*, 490 U.S. at 7-8, 109 S. Ct. 1581 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983)). At the same time, however, factors that have so little pro-

bative value that no reasonable officer would rely on them in deciding to make an investigative stop must be disregarded. *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446 (9th Cir. 1994).

Although the level of suspicion required for a brief investigatory stop is less demanding than that required to establish probable cause, the Fourth Amendment requires an objective justification for such a stop. *Sokolow*, 490 U.S. at 7, 109 S. Ct. 1581. Thus, the Supreme Court has held that reasonable suspicion does not exist where an officer can articulate only "an 'inchoate and unparticularized suspicion or 'hunch' of criminal activity.'" *Illinois* v. *Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L.Ed.2d 570 (2000). Rather, reasonable suspicion exists only when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.[8] *United States* v.

[8] In *Brignoni-Ponce*, the Court listed factors which officers might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. Those factors include: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975). We note, however, that reasonable suspicion is not a numbers game. Different factors have varying levels of significance, depending on their context. *See Montero-Camargo*, 208 F.3d at 1130, n.12; *see also Sokolow*, 490 U.S. at 10, 109 S. Ct. 1581. Thus, where a stop is based upon a number of factors, each of which carries only minimal probative weight, quantity does not necessarily make up for the lack of quality.

Cortez, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981); *United States* v. *Salinas*, 940 F.2d 392, 394 (9th Cir. 1991). In turn, particularized suspicion means a reasonable suspicion that *the particular person being stopped* has committed, or is about to commit, a crime. *Cortez*, 449 U.S. at 418, 101 S. Ct. 690.

At times, conduct that may be entirely innocuous when viewed in isolation may nevertheless properly be considered in determining whether or not reasonable suspicion exists. *Sokolow*, 490 U.S. 1, 10, 109 S. Ct. 1581 (citations and footnotes omitted) (citing *Illinois* v. *Gates*, 462 U.S. 213, 243-44, n.13, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983)). Put another way, "conduct that is not necessarily indicative of criminal activity may, in certain circumstances, be relevant to the reasonable suspicion calculus." *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1130 (9th Cir. 2000) (en banc); *Wardlow*, 528 U.S. at 125, 120 S. Ct. at 677. At the same time, innocuous conduct does *not* justify an investigatory stop unless other information or surrounding circumstances of which the police are aware, considered together with the otherwise innocent conduct, provides sufficient reason to suspect that criminal activity either has occurred or is about to take place. *Guam* v. *Ichiyasu*, 838 F.2d 353, 355 (9th Cir. 1988).

In all circumstances, law enforcement officials are entitled to assess the facts in light of their experience. *Brignoni-Ponce*, 422 U.S. at 885, 95 S. Ct. 2574. Nevertheless, "[w]hile an officer may evaluate the facts supporting reasonable suspicion in light of his experience, experience may not be used to give the officers unbridled discretion in making a stop." *Nicacio* v. *INS*, 797 F.2d 700, 705 (9th Cir. 1986), *overruled in part on other grounds in Hodgers-Durgin* v. *De La Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999); *see also United States* v. *Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999). Thus, while an officer's experience may furnish the background against which the relevant facts are to be assessed as long as the inferences he draws are objectively reasonable, *Cortez*, 449 U.S. at 418, 101 S. Ct. 690, experience is not an independent factor in the reasonable suspicion analysis. *Montero-Camargo*, 208 F.3d at 1131-32.

3. *Analysis*

In finding that the stop by Agent Stoddard was justified by reasonable suspicion, the district court relied on the following list of factors: 1) smugglers used the road in question to avoid the border patrol station; 2) Arvizu drove by within an hour of a Border Patrol shift change; 3) a minivan stopped on the same road a month earlier contained drugs; 4) minivans are among the types of vehicles commonly used by smugglers; 5) the minivan slowed as it approached the Border Patrol vehicle; 6) Arvizu appeared rigid and stiff, and did not acknowledge the officer; 7) the officer did not recognize the minivan as a local car; 8) the children's knees were raised, as if their feet were resting on something on the floor of the van; 9) the children waved for several minutes but not towards the officer; and 10) the van was registered to an address in a neighborhood notorious for smuggling. Based on these factors, the district court concluded that reasonable suspicion did exist. We disagree.

"What factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated. When courts invoke

multi-factor tests, balancing of interests or fact-specific weighing of circumstances, this introduces a troubling degree of uncertainty and unpredictability into the process; no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it." *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J. concurring). Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here.

In reaching our conclusion, we find that some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion. We begin by considering the factors the district court improperly relied on, before turning to those which it properly took into account.

One of the factors on which the district court relied—namely, the fact that the minivan slowed as it approached the Border Patrol vehicle—is squarely prohibited by our precedent. *United States* v. *Montero-Camargo*, 208 F.3d at 1136; *United States* v. *Garcia-Camacho*, 53 F.3d 244, 247 (9th Cir. 1995). We note that Agent Stoddard never claimed that Arvizu broke any traffic laws. Nor, for that matter, did he assert that Arvizu drove erratically or evasively. Rather, Arvizu simply slowed down. As we have previously noted, slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity. *Id.* at 247; *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1419 (9th Cir. 1989).

A second factor relied on by the district court, Arvizu's failure to acknowledge Agent Stoddard, is of "questionable value . . . generally"[9] and carries weight, if at all, only under special circumstances. *See Hernandez-Alvarado*, 891 F.2d at 1419 n.6 ("avoidance of eye contact has been deemed an inappropriate factor to consider unless special circumstances make innocent avoidance of eye contact improbable") (internal quotations omitted). As we have held previously, a failure to acknowledge a law enforcement officer by look or gesture, while possibly indicating a lack of neighborliness, ordinarily does not provide a basis for suspecting criminal activity. *Garcia-Camacho*, 53 F.3d at 247; *Gonzalez-Rivera*, 22 F.3d at 1446. Although we have held that the lack of eye contact may be considered under *some* circumstances, we have always treated that factor with appropriate "skepticism" because "reliance upon 'suspicious' looks [or, as the case may be, the failure to look] can . . . easily devolve into a case of damned if you do, equally damned if you don't." *Montero-Camargo*, 208 F.3d at 1136; *see also Gonzalez-Rivera*, 22 F.3d at 1446-47; *Nicacio*, 797 F.2d at 704; *United States* v. *Mallides*, 473 F.2d 859, 861 n.4 (9th Cir. 1973) (collecting cases). Because no "special circumstances" rendered "innocent avoidance . . . improbable," Arvizu's failure to acknowledge Stoddard's presence by waving, or by indicating some other form of recognition, *Hernandez-Alvarado*, 891 F.2d at 1419 n.6, provides no support for Stoddard's reasonable suspicion determination.

For similar reasons, we find that the children's conduct carries no weight in the reasonable suspicion

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[9] *Montero-Camargo*, 208 F.3d at 1136 (quoting *United States* v. *Munoz*, 604 F.2d 1160, 1160 (9th Cir. 1979) (per Kennedy, J.)).

calculus. If every odd act engaged in by one's children while sitting in the back seat of the family vehicle could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes. More to the point, if a driver's failure to wave at an officer provides no support for a determination to stop a vehicle, it would be incongruous to say that the vehicle could be stopped because children who were passengers in the car did wave. *See, e.g., Garcia-Camacho*, 53 F.3d at 247.

As we have previously held, "factors that have such a low probative value that no reasonable officer would have relied on them to make an investigative stop must be disregarded as a matter of law." *Montero-Camargo*, 208 F.3d at 1132 (citation omitted). An examination of four additional factors—namely, the third, seventh, eighth, and tenth—demonstrate that they have little or no weight under the circumstances. The fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion. (In contrast, as we discuss below, evidence that in the Border Patrol's experience, minivans are sometimes used by smugglers may be of *some* probative value, because the inference arises from more than a single, isolated incident.)

The fact that the officer did not recognize the minivan as belonging to a local resident also fails to contribute to the reasonable suspicion calculus. Evidence introduced at the suppression hearing made it clear that the area in question is one that is used for many purposes by different kinds of people—local residents use the roads as a shortcut, while both residents and tourists alike camp, hike, bike, picnic, and visit the local forest and national monument. Accordingly, it is hardly

surprising that a Border Patrol agent would not recognize every passing car.

Similarly, the fact that a van is registered to an address in a block notorious for smuggling is also of no significance and may not be given any weight. *See United States* v. *Jimenez-Medina*, 173 F.3d 752, 755 (9th Cir. 1999) (holding that "coming from the wrong neighborhood" does not give rise to reasonable suspicion). In arriving at this conclusion, we first consider the cases which involve an individual's presence in a high crime area. The rule that controls such cases is that presence in a high crime area is not enough in and of itself to give rise to reasonable suspicion, *Brown* v. *Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L.Ed.2d 357 (1979), but "officers are not required to ignore the relevant characteristics of a location" when an individual's conduct, if considered in the context of that location, gives rise to reasonable suspicion that a crime has been or is being committed. *Wardlow*, 528 U.S. at 124, 120 S. Ct. at 676 (quoting *Adams* v. *Williams*, 407 U.S. 143, 144, 147-48, 92 S. Ct. 1921, 32 L.Ed.2d 612 (1972)). In contrast, where a person lives is an entirely different matter, and one's place of residence is simply not relevant to a determination of reasonable suspicion. Otherwise, persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming the victims of crimes but also of being victimized by the state's efforts to prevent those crimes—because their constitutional protections against unreasonable intrusions would be significantly reduced.

Moreover, in *Montero-Camargo*, we cautioned that "courts should examine with care the specific data

underlying" the assertion that an area is one in which "particular crimes occur with unusual regularity."[10] *Montero-Camargo*, 208 F.3d at 1138. In this case, the data simply does not withstand that scrutiny. The only evidence in the record to support the "high crime" characterization is Stoddard's assertion that the 400 block was "one of the most notorious areas" for drug and alien smuggling. Agent Stoddard did not explain the factual basis for this assertion, nor did he identify the source of his information. For this reason as well, we conclude that the district court's reliance on this factor was misplaced. *See Montero-Camargo*, 208 F.3d at 1143 (Kozinski, J., concurring in the result) (noting that "[j]ust as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area").

Finally, we note that the fact that the children's knees were raised, while consistent with the placement of their feet on packages of illicit substances, is equally (if not more) consistent with the resting of their feet on a cooler, picnic basket, camping gear, or suitcase. In determining whether reasonable suspicion exists, we have considered whether a car appears heavily loaded. *Garcia-Camacho*, 53 F.3d at 245-46; *United States* v. *Franco-Munoz*, 952 F.2d 1055, 1057 (9th Cir. 1991), *overruled in part on other grounds by Montero-Camargo*, 208 F.3d at 1134, n.22; *United States* v. *Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973). We have done so where the vehicle was riding low or responded sluggishly to bumps. *Garcia-Camacho*, 53 F.3d at 245;

[10] As we noted in that case, our citing of the area where the stop took place as a "high crime area" was conditioned on the unique circumstances of the area—an isolated, uninhabited locale not used for any legitimate purpose.

Franco-Munoz, 952 F.2d at 1057. In general, however, we have not given that factor much weight, absent other circumstances that warrant attributing particular significance to it. *Garcia-Camacho*, 53 F.3d at 249 (finding the fact that a truck with two passengers and a camper appeared heavily laden to be of little weight); *United States* v. *Rodriguez*, 976 F.2d 592, 596 (9th Cir. 1992). In this case, moreover, we are faced with an entirely different situation, in which Officer Stoddard first inferred from the fact that the children's knees were raised that their feet were resting on some sort of object. From this, he next inferred that whatever the children were using as a footrest might well be contraband. That a family travelling in a minivan might put objects on the floor of the van and that children might use those objects as a footrest does not seem at all odd to us. In short, we find this factor also to be all too common to be of any relevance.

Having considered those factors that are *not* relevant in this case, we must now turn to those that are —namely, that the road was sometimes used by smugglers, that Arvizu was driving on the road near the time that the Border Patrol shift changed, and that he was driving a minivan, a type of car sometimes used by smugglers. Although these factors are indeed both legitimate and probative to *some* degree, *see, e.g.*, *Franco-Munoz*, 952 F.2d at 1057, they are not enough to constitute reasonable suspicion either singly or collectively. *Jimenez-Medina*, 173 F.3d at 752-56; *Rodriguez*, 976 F.2d at 594-96; *Hernandez-Alvarado*, 891 F.2d at 1419-19; *Garcia-Camacho*, 53 F.3d at 247-49.

As the testimony at the suppression hearing made clear, the road in question is used for a number of en-

tirely innocuous purposes—including as a way of getting to camping grounds and recreational areas, and as a shortcut when travelling from one community to another. Thus, the fact that Arvizu's car was using the road is of only moderate significance. Similarly, minivans, although sometimes used by smugglers, are among the best-selling family car models in the United States. Thus, although, under the applicable case law, the make of the car may be of *some* relevance in determining whether reasonable suspicion exists, it does not carry particular weight here. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885, 95 S. Ct. 2574, 45 L.Ed.2d 607 (1975); *United States* v. *Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir. 1997); *Bugarin-Casas*, 484 F.2d at 855. We also find that the time at which Arvizu drove by the sensors on Leslie Canyon Road, although relevant, *Franco-Munoz*, 952 F.2d at 1057, is of little probative value, especially in the absence of other factors that tend more persuasively to demonstrate evasive behavior. *Jimenez-Medina*, 173 F.3d at 754-55. In this case, Arvizu's car passed by the sensors at around 2:15 p.m., approximately 45 minutes before the scheduled shift change. While it makes sense to us that smugglers might wish to take advantage of shift changes, a car's travelling on a road in the general area of a Border Patrol station three quarters of an hour before the actual shift change does not seem to us to add much to the mix.

Given the above analysis, we hold that the stop by Agent Stoddard was not supported by reasonable suspicion. The next question, then, is whether the illegality of the stop taints the evidence as a result of the search that ensued. We hold that it does.

Under the Fourth Amendment, an illegal stop taints all evidence obtained pursuant to the stop, unless the taint is purged by subsequent events. *United States* v. *Morales*, 972 F.2d 1007, 1010 (9th Cir. 1992); *United States* v. *Delgadillo-Velasquez*, 856 F.2d 1292, 1299 (9th Cir. 1988). Accordingly, in *Florida* v. *Royer*, 460 U.S. 491, 508, 103 S. Ct. 1319, 75 L.Ed.2d 229 (1983), the Supreme Court suppressed the evidence discovered as a result of a search following an illegal stop, even though the police obtained the defendant's consent to the search, because the illegal stop tainted the subsequent consent.[11]

In determining whether the taint of an illegal stop has been purged, "[t]he question we must ask is whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *United States* v. *Millan*, 36 F.3d 886, 890 (9th Cir. 1994) (internal quotations omitted). The government bears the burden of showing admissibility. *United States* v. *Taheri*, 648 F.2d 598, 601 (9th Cir. 1981); *United States* v. *Perez-Esparza*, 609 F.2d 1284, 1290 (9th Cir. 1979).

Federal courts have invariably found that consents to search at the time of or shortly following an illegal stop of a vehicle are unlawful because the search is tainted by the primary illegality and the taint has not been

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[11] In the context of a confession obtained after an illegal arrest, this court held that, in order to be admissible, such statements must not only "meet the Fifth Amendment standard of voluntariness but . . . be 'sufficiently an act of free will to purge the primary taint.'" *United States* v. *Ricardo D.*, 912 F.2d 337, 342 (9th Cir. 1990).

purged.[12] That makes sense to us. Ordinarily, when a car is illegally stopped, the search that follows will be a product of that stop, as will any consent to that search. Here, the interrogation, consent and search flowed directly from the stop. *United States* v. *Hernandez*, 55 F.3d 443, 447 (9th Cir. 1995); *Millan*, 36 F.3d at 890. No events occurred after the stop that served to purge the subsequent consent and search of the taint. Rather, the officer merely questioned Arvizu, became suspicious because of his answers, and asked for consent. This is a classic case of obtaining evidence through the exploitation of an illegal stop, as is the case in which an officer's suspicions are aroused by what he observes following the stop, and on that basis obtains such consent. Accordingly, we hold that the taint of the illegal stop was not purged by intervening events.

Because we conclude that the stop by Agent Stoddard was not supported by reasonable suspicion and that there were no intervening events that purged the taint of the illegal stop, we reverse the district court's denial of Arvizu's motion to suppress.

REVERSED and REMANDED.

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[12] *See, e.g., United States* v. *Chan-Jimenez*, 125 F.3d 1324, 1326-27 (9th Cir. 1997); *United States* v. *McSwain*, 29 F.3d 558, 563-64 (10th Cir. 1994); *United States* v. *Chavez-Villareal*, 3 F.3d 124, 127-28 (5th Cir. 1993); *United States* v. *Valdez*, 931 F.2d 1448, 1452 (11th Cir. 1991).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR 98-157-TUC-FRZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

RALPH ARVIZU, DEFENDANT

[December 7, 1998]

MOTIONS HEARING

BEFORE: HONORABLE FRANK R. ZAPATA
UNITED STATES DISTRICT COURT JUDGE
55 E. BROADWAY
TUCSON, ARIZONA 85701

APPEARANCES

FOR THE GOVERNMENT: MS. CHRIS CABANILLAS, Assistant United States Attorney.

FOR THE DEFENDANT: MS. VICTORIA BRAMBL, Assistant Federal Public Defender.

* * * * *

[134] THE COURT: Thank you.

[135] Well, the court finds that there was in fact a founded reasonable suspicion based upon reasonable objective and articulable facts for the stop in this case.

The court has to view the case in the context of what was going on out there and in the context of the information available to the officer making the stop.

First of all, there is a checkpoint out there at I-91 and Rucker Canyon Road. The road that the defendant was on is the only road east of that checkpoint that parallels I-91 that travels north away from the border, Leslie Road, starting at the border and traveling on north.

Obviously that is an item and an issue that the agents have to be aware of. That is obviously supported by the fact that they have got sensor devices on this road that is some 30 miles from the border, obviously expecting traffic that would circumvent the checkpoint using that parallel and poorly traveled road parallel the I-91 and going north and avoiding the checkpoint at the same time. That is why the sensors are important.

The fact that there was discussion about what is out there at the point that the vehicle was seen, it had already passed in that area the Rucker Canyon area that could be considered a recreation area. The next one is quite a few miles to the north up in the area of the Chiricahua National Monument.

[136] But that road is—that area is accessible through paved road I-91 and then taking paved road 181. And picking up the road from there, paved I-181, all the way to that area does not require certainly a 40-to 50-mile trip, if the facts are correct, 40-mile trip at least, through a dirt road.

It was a road that a vehicle sedan could travel on, from the information presented by Mr. Chacon. Probably not the best road to have a minivan on but nothing that would prevent a minivan from being on there.

The agent then certainly is alerted to some problem as far as the amount of traffic on the road. The only testimony that we had was that they receive a sensor hit about four times in an eight-hour shift which would be a car every two hours if you spread it out over the eight-hour period.

That certainly isn't a heavily traveled road by any stretch of the imagination if that is what is going on there and that it is all we have in terms of volume of traffic on that road in that particular area.

When the agent comes out and sees in fact a vehicle traveling north on that dirt road and sees, to his estimation, that the vehicle slows down when the vehicle sees him, slows down appreciably, that is now an articulable fact.

We put that together with the agent's knowledge that, number one, this is a road used to circumvent the checkpoint; number two, they are on shift change about this [137] time and agents are returning to the checkpoint leaving this area open. And that is information that is available to the agent which he has to consider in determining whether or not he's got a suspicious circumstance or not, and clearly it is something that he could and did consider in this case.

The type of vehicle that he observed here usually we hear testimony about some area being a notorious smuggling area. They talked about that. They also talked about the fact that a month before a very similar-type vehicle had been stopped in that very same area also carrying a load of marijuana; which clearly, given those two facts, the type of vehicle becomes important and can also become an articulable fact.

The agent himself testified having been involved in a number of stops there, all of them involving transportation of aliens in similar-type vehicles. So that also becomes an articulable fact.

The matter about posture, obviously the frozen stare, the failure to stare, all of that has been looked at. It doesn't mean whole lot in terms of articulable suspicion. But if from this the person appears to be nervous and the demeanor of the person is one that is consistent with somebody who is involved in illegal activity, then that can be considered as part of the reasonable suspicion as again a reasonable objective articulable fact.

[138] What surprises me is the defendant's testimony that he was relaxed when he saw the agent. I find it very difficult to believe that somebody carrying 125 or 128 pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer. I think that does not bode well for the defendant's position regarding that issue.

The agent testified that he has worked that area, that he didn't recognize this vehicle as being one from the ranches in that area. Obviously an agent is not going to know all of the vehicles nor all of the visitors that would come into an area, but, again, it is a fact that can be considered. It's not going to carry the day certainly, but certainly it is something that is worthy of consideration.

Certainly given this the agent had enough information to start observing this vehicle. When he started observing this vehicle, started to follow it, he saw some odd things about the vehicle.

First, the manner about the way the children were sitting in the vehicle; making him, in his experience, to believe that there was something in behind that back

seat and the children couldn't put their feet down. Could have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity.

Secondly, the methodical way, mechanical way, abnormal way that the children waved off and on for a period [139] of four to five minutes without even turning around to look at the agent. This certainly was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this and would certainly lend some weight to a reason for stopping to see if in fact they are standing on a bundle of marijuana or there is other people lying on the floor of the vehicle or something of this nature.

The registration check again, in and of itself, doesn't mean a lot. But if you have already got this vehicle in an area that gives rise to the belief that it is avoiding a checkpoint and all these other facts about the vehicle and the occupants, the behavior of the occupants, that would certainly raise a suspicion, then the registration check that comes back to an area that they know to be an often-used smuggling area, then that can also be thrown in and considered as part of the basis for a founded suspicion in this case.

So I find that there was in fact founded or reasonable suspicion based upon these facts and I find them to be reasonable and objective and articulable facts to support the stop of the vehicle.

Once the agent stops the vehicle, he approaches the driver, has some small talk, asks for his citizenship, and then asks him if he can search the vehicle. Now, the driver believes that what he consented to was that he

was asked by the agent if he could take a look around the vehicle.

[140] Now, I don't think it is reasonable to believe that when a police officer stops you and asks you that, that what he wants to do is walk around your vehicle. It is clear what he wants to do is search your vehicle. There is no lack of clarity or uncertainty that the agent was asking to search the vehicle if the defendant consented to that. The defendant told him he could. There was a consent to the search.

Now, the business about whether or not he had his hand on his gun or not, there was no testimony that the defendant was coerced in any way, he felt he was coerced in any way, talked about the agent having his hand on his gun, but that was it. So I don't find that that shows any coercion, overbearing of his will, that would make the consent illegal.

So there was a consent to search. And once the agent opened the door, smelled the marijuana, then there was obviously probable cause to search the bags within the vehicle. I specifically find that the consent covered the vehicle and anything within it. But if it didn't cover the bags within it, there was probable cause for the search of that once he saw the black bag and smelled the marijuana.

Again, it is pretty difficult to believe that in January with all the windows rolled up, as the defendant stated that they were, and only rolled down when the officer came up to talk to him, there would be 123 pounds of marijuana [141] inside the cab of the vehicle in a duffel bag and that that would not produce any odor that was—that could be smelled by a person within the vehicle.

I think the defendant's testimony—the defendant's testimony as to that is less credible than the agent's given those facts.

Based on those matters the motion to suppress is denied.

Is there anything further?

MS. BRAMBL: No, Your Honor.

THE COURT: Thank you. We stand at recess.

(The proceedings concluded at 2:55 p.m.)

No. 00-1519

IN THE

SUPREME COURT OF THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Petitioner,

-vs.-

RALPH ARVIZU

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED
MAY 3 2001
OFFICE OF THE CLERK

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH ARVIZU,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Ralph Arvizu, by and through his court appointed counsel, Victoria A. Brambl, Assistant Federal Public Defender, respectfully requests this Honorable Court for leave to proceed in forma pauperis in responding to the government's petition for a writ of certiorari. As grounds therefor he states that undersigned counsel was appointed pursuant to the Criminal Justice Act, was appointed by the United States Court of Appeals for the Ninth Circuit, and he is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner respectfully requests that he be granted leave to proceed in forma pauperis.

Respectfully submitted this 3rd day of May, 2001.

FREDRIC F. KAY
Federal Public Defender
Victoria Brambl
VICTORIA A. BRAMBL
Assistant Federal Public Defender
Attorney for Respondent

No. 00-1519

IN THE

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ON PETITION FOR WRIT OF CERTIORARI
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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals correctly follow and apply the rule of this Court in *United States v. Brignoni-Ponce, 422 U.S. 873 (1975),* when it considered the "totality of the circumstances" and found no reasonable suspicion to stop Mr. Arvizu's van, when it was traveling along a public road adjacent to a popular national recreation area in the middle of the day, where the Border Patrol Agent offered the following reasons for the stop: (1) the van slowed as it approached the Border Patrol vehicle; (2) Mr. Arvizu failed to acknowledge the agent; (3) the children in the back seat began to wave at the agent; (4) agents had stopped one minivan containing marijuana during the past month on the same road; (5) the agent did not recognize the van; (6) the van was validly registered to a Douglas address located in a block that he claimed is notorious for smuggling activity; (7) the children's knees were slightly elevated; (8) the 2:15 p.m. stop occurred forty-five minutes before Border Patrol shift change; (9) smugglers sometimes use minivans; (10) the road could be used for checkpoint evasion; and (11) the road was sometimes used by smugglers? Does the decision fail to follow this Court's precedent or create a conflict with other circuits?

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No. 00-1519

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA

Petitioner,

-vs.-

RALPH ARVIZU

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION
TO
PETITION FOR WRIT OF CERTIORARI

Respondent, Ralph Arvizu, through counsel, respectfully requests this Court to deny the petition for writ of certiorari and refuse to issue a writ to review the judgment and opinion of the Ninth Circuit Court of Appeals in *United States v. Arvizu, 217F.3d 1224 (9th Cir. July 7, 2000),* amended, *232 F.3d 1241 (9th Cir. Dec. 1, 2000).*

STATEMENT

This case began when Border Patrol Agent Stoddard learned of a sensor hit along Leslie Canyon Road. The sensor does not detect border crossing activity because it is located twenty or thirty miles from the international border. (12/7/98 Tr.34). Agent Stoddard had no reason to believe the vehicle had recently crossed the United States-Mexico border, only that it was traveling on Leslie Canyon Road.

The temporary checkpoint is approximately thirty miles from the international border and is not operational daily, but once it begins running it stays open for two months at a time. (12/7/98 Tr. 10,33-4). Although the checkpoint was operational on January 19, 1998, the government presented no evidence that smugglers knew when the checkpoint operated or that smuggling occurs whether or not the checkpoint is operating. In fact, Border Patrol Agent Stoddard testified that he did not remember how long the checkpoint had been operational on January 19, 1998 and there is "no rhyme or reason" as to when it is open. (12/7/98 Tr.34).

The defense introduced as an exhibit a map depicting the area, which is appended to this response.[1] Although Leslie Canyon Road is not within the Coronado National Forest, roads leading from the area access the forest, including recreational areas (both camping and picnic areas) and the Chiricahua National Monument.

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[1]A map of this area is set forth in the Appendix. For this Court's convenience counsel highlighted in blue Mr. Arvizu's route of travel and added several numbers marking areas referred to during testimony: Number 1 marks the Border Patrol checkpoint; Number 2 marks the approximate area of sensor activity; Number 3 marks the approximate area where Mr. Arvizu's vehicle passed Border Patrol Agent Stoddard's stationary vehicle; and Number 4 marks the approximate area where the stop occurred. These marks have been added for this Court's convenience and follow the testimony during the suppression hearing. The defense introduced this map as an Exhibit [1A] during the suppression hearing and added the highlighted areas and numbers to assist the Ninth Circuit Court of Appeals.

The government states that when the vehicle turned west from Leslie Canyon Road onto Rucker Canyon Road, it was heading away from recreational areas in the National Forest accessible from east Rucker Canyon Road, implying there were no recreational destinations along the route the minivan traveled. This is not so. The government ignores the many areas accessible along the van's route of travel. (Pg.3-4). There were many legitimate destinations even after Mr. Arvizu turned onto Kuykendall Cutoff Road, including the northern portion of Chiricahua National Monument, campgrounds in Turkey Creek, Onion Saddle, and Buena Vista Peak, and scenic locations such as Rock Canyon and Lookout Tower. The government's map does not depict these areas. Moreover, Kuykendall Cutoff Road is an aptly-named shortcut for all eastbound motorists traveling toward Willcox and New Mexico. (12/7/98 Tr.76-9).

During the suppression hearing, the government claimed the roads Mr. Arvizu traveled – Leslie Canyon Road, Rucker Canyon Road, and Kuykendall Cutoff Road – are normally traveled by four-wheel-drive vehicles. Agent Stoddard conceded, however, that sedans or vans are capable of driving on the roads. (12/7/98 Tr.21,46). Agent Stoddard also testified Kuykendall Cutoff Road was unsuitable for passenger vehicles because it is only maintained occasionally and there are a lot of washouts when it rains. (12/7/98 Tr.21). Victor Chacon, an investigator for the Federal Public Defender's Office and a former resident of Douglas, testified there were no travel restrictions on Leslie Canyon, Kuykendall Cutoff, or Rucker Canyon Roads. (12/7/98 Tr. 61-2). When he retraced Mr. Arvizu's route, he did not need to put his vehicle into four-wheel drive during any portion of the route. (12/7/98 Tr. 61-2).[2]

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[2]The government's petition omits the district court judge's finding that the road "was a road that a vehicle sedan could travel on." (12/7/98 Tr.136). The district court judge made this finding despite Agent Stoddard's attempt to depict the roads as too rough for a minivan. (12/7/98 Tr.21).

Agent Stoddard found the van's turn onto Kuykendall Road "significant" because: the type of vehicle was not "normal;" he didn't recognize the vehicle; and the turn would be the final route of travel to circumvent the checkpoint. (12/7/98 Tr.22).

But Mr. Chacon's testimony established that many legitimate destinations are accessible along the route Mr. Arvizu traveled, including: houses and ranches peppered throughout the area; the community of Sunizona; several smaller settlements; Turkey Creek; Rucker Canyon; and Hunt Canyon. (12/7/98 Tr.69-70). The area includes Chiricahua National Monument, which is popular for hiking and bicycling, as well as sightseeing, picnicking, and camping. (12/7/98 Tr. 70). The area is also very popular amongst Douglas area residents who use it for recreational purposes. (12/7/98 Tr.70). There are also houses, ranches, and schools throughout the area. (12/7/98 Tr.69-70). Mr. Chacon also explained how the route Mr. Arvizu traveled would have been a shortcut for someone traveling from Douglas to any area accessible from Interstate-10, traveling east, such as Wilcox (but it would not be a shortcut traveling west on Interstate-10, such as from Douglas to Tucson). (12/7/98 Tr. 76-9). Mr. Chacon also testified that he could safely drive a two-wheel-drive, low-clearance vehicle on each of the roads. (12/7/98 Tr.81).

Agent Stoddard admitted he was not "real familiar" with Chiricahua National Monument but knew "that it exists in the area." (12/7/98 Tr.35). He conceded it is a scenic location visited by many people. (12/7/98 Tr.35). All of the roads are open to the public. (12/7/98 Tr.37;67). In fact, cars traveled this road about four times per eight hour shift or twelve times per day. (12/7/98 Tr.12-13). Thus, the route Mr. Arvizu traveled was neither seldom-used nor remote.

Agents typically learned of sensor hits every couple of hours in this area. (12/7/98 Tr.39-40). But there was no testimony that alien or narcotics smugglers account for more than a small

proportion of these "hits."

The government claims, without citing the record, that Agent Stoddard "knew" a vehicle turning right onto Kuykendall Cutoff Road would "avoid the checkpoint and proceed to Tucson or Phoenix with minimal law enforcement surveillance." (Pg.4). The record is silent about the extent of law enforcement surveillance along that route and Agent Stoddard never claimed to "know" that the van was avoiding the checkpoint. Of course, Agent Stoddard could not have "known" that a car would turn west along I-10 toward Tucson, as opposed to east toward Willcox or Lordsburg, or that the car would not turn off into one of the camping areas or picnic sites along the route.

Agent Stoddard testified that 2:15 p.m. is close to a 3:00 p.m. shift change when agents conducting roving patrols return to the checkpoint. (12/7/98 Tr. 11). Shift changes occur three times per day. (12/7/98 Tr.31). But Agent Stoddard conceded that the time at which Border Patrol agents return to the checkpoint for shift change depends upon their location – how far they are away from the checkpoint. (12/7/98 Tr.31-2). Agent Stoddard also conceded that agents might use Leslie Canyon Road -- the very road he claimed Mr. Arvizu used to avoid Border Patrol -- to return to the Border Patrol checkpoint at shift change. (12/7/98 Tr.33).

Agent Stoddard recalled an incident related to him by another Border Patrol agent involving a minivan traveling in the same general area from which several bales of marijuana were ejected. (12/7/98 Tr.12). The incident had occurred approximately one month earlier. (12/7/98 Tr.12). The agent in that case apprehended the van and that incident was completely unrelated to the events in this case. (12/7/98 Tr.12,38-9). Agent Stoddard admitted he had never been involved in a narcotics smuggling arrest in this area although he had been involved in alien smuggling stops. (12/7/98 Tr.39).

Absent from the government's proof is any indication that there was anything unusual about the minivan, such as tinted or obscured windows or the appearance of being heavily laden. Although Agent Stoddard did not recognize the van, he did not claim to know all the vehicles in the area and did not dispute that people other than local residents use the roads in question.

Agent Stoddard decided to wait for the vehicle along Rucker Canyon Road, which is a road linking Leslie Canyon Road to Kuykendall Cutoff Road and, as the name suggests, is a shortcut. (12/7/98 Tr.42). Agent Stoddard's vehicle was stationary when Mr. Arvizu's vehicle passed by. (12/7/98 Tr.40). He did not have radar but guessed the van's original speed as approximately 50 to 55 mph. (12/7/98 Tr.40). Agent Stoddard attached significance to Mr. Arvizu's vehicle being a Toyota minivan, claiming it is a "very commonly used vehicle to smuggle both illegal aliens and narcotics." (12/7/98 Tr.18). The agent did not back up this statement with any facts, statistics, or anectodal evidence, however.

The vehicle slowed down to approximately 25 mph and turned to the right, following a fork in the road. (12/7/98 Tr.40). Agent Stoddard conceded Mr. Arvizu's driving was not hazardous and did not obstruct traffic. (12/7/98 Tr.41). Again Agent Stoddard could only guess the speed of Mr. Arvizu's van because he was stationary and not using radar. (12/7/98 Tr.40). There was no testimony that Mr. Arvizu's driving was unsafe or violated any traffic laws.

Agent Stoddard described Mr. Arvizu's posture as rigid, with both hands on the steering wheel. (12/7/98 Tr.18). He further commented Mr. Arvizu did not look at him and acted "as if he was ignoring me." (12/7/98 Tr.18). Agent Stoddard also claimed a passenger appeared "fairly uptight as well," though he explained no underlying basis for this subjective belief. (12/7/98 Tr.18). Agent Stoddard denied that law-abiding citizens sometimes react in such a way to law enforcement

officers, claiming "most of them look ... and would give us a friendly wave;" he interpreted a rigid posture as "usually indicat[ing] that they were trying to hide something." (12/7/98 Tr.42).

Despite this, Agent Stoddard then claimed he became even more suspicious when the children in the van began waving at him. He claimed that "it wasn't in a normal pattern" and "it looked like they were instructed" to wave at him. (12/7/98 Tr.20,44). He also noticed the children in the backseat were sitting as if their feet were resting on something ("cargo"), with their knees slightly higher than normal. (12/7/98 Tr.7,19). The children's knees, however, were not even as high as chest level. (12/7/98 Tr.43). This factor is as suggestive of resting on pillows, camping supplies, or suitcases as of resting on cargo.[3]

Agent Stoddard decided to follow Mr. Arvizu's vehicle. The vehicle signaled a turn onto Kuykendall Road "kind of early," briefly turned off the indicator, then turned it back on and turned. (12/7/98 Tr.20-1,44-5). To drive from Rucker Canyon Road onto Kuykendall Road does not require a turn but a motorist must follow a right-hand fork or "T" in the road. (12/7/98 Tr.54,71,80). The road is not as well maintained as other area roads but Agent Stoddard conceded that sedans or vans can safely drive on it. (12/7/98 Tr.21). Agent Stoddard's reports did not mention any unusual road conditions, such as flooding or wash-outs along any of these roads. (12/7/98 Tr. 47).

Agent Stoddard then checked the van registration over the radio. The van was not stolen, had valid Arizona license plates, and was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. (12/7/98 Tr.48). Agent Stoddard claimed the 400 block of Douglas, Arizona was "one of the most notorious areas" of narcotic and alien smuggling in the Douglas area. (12/7/98 Tr.22). He

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[3] Agent Stoddard's use of the word "cargo" was surely an afterthought because he claimed he stopped the van for suspected alien smuggling, not marijuana. (RT19;ER49).

admitted that in his report he described the area only as being "notorious" for alien smuggling. (12/7/98 Tr. 48-9). Agent Stoddard conceded that he had no information or intelligence suggesting any illegal activity -- either drug or alien smuggling -- at 403 4th Street. (12/7/98 Tr.49). Nor did Agent Stoddard have any information associating illegal activity with Leticia Arvizu, Ralph Arvizu, or the van. (12/7/98 Tr.50).

Agent Stoddard did not testify that, in his experience, smugglers act as Mr. Arvizu did.

After checking the van registration, Agent Stoddard decided to stop the van, not to check for drugs, but to perform an immigration check on the occupants:

> Q. Now, your report indicates that you stopped Mr. Arvizu's vehicle, not because you thought it had drugs in it but to perform an immigration check on the occupants. Is that right?
>
> A. Correct.

(12/7/98 Tr.23,50). Agent Stoddard conceded he made the stop despite there being nothing about the appearance of the van's occupants that made him suspect they were illegal aliens. (12/7/98 Tr.50). Agent Stoddard did not stop the van for a traffic violation. (12/7/98 Tr. 41).

The Ninth Circuit ruled that the stop was illegal under the "totality of the circumstances" and the illegality of the stop tainted Mr. Arvizu's consent. The Court found: "This is a classic case of obtaining evidence through the exploitation of an illegal stop, as is the case in which an officer's suspicions are aroused by what he observes following the stop, and on that basis obtains consent." (*232 F.3d at 1252*). The government did not include the ruling about consent in its petition for writ of certiorari and, therefore, this response does not discuss the facts or precedent surrounding the consent issue.

REASONS WHY THE PETITION SHOULD BE DENIED

ARGUMENT

I. Grounds Asserted for Granting Petition

This Court rarely grants petitions for writ of certiorari when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Rule 10, Supreme Court Rules*. Rule 10 provides two theoretically possible grounds for granting the government's petition for writ of certiorari: (1) Rule 10(a), where a court of appeals has entered a decision in conflict with the decision of another court of appeals on the same important matter or has departed from the accepted and usual course of judicial proceedings to such a degree as to call for an exercise of this Court's supervisory power; and (2) Rule 10(c), where a court of appeals has decided an important federal question that has not been, but should be, settled by this Court, or decided it in such a way that conflicts with a relevant decision of this Court.

The government's petition for writ of certiorari alleges that the Ninth Circuit's opinion has departed fundamentally from this Court's totality-of-the-circumstances test, created a direct conflict with decisions of this Court and other Courts of Appeals, incorrectly excluded critical evidence, and undermined effective law enforcement in the Ninth Circuit. The following paragraphs show that the opinion correctly recited and followed the applicable precedent, considered all of the evidence, and has not created a conflict with other circuits. Thus, the government's argument boils down to a claim that the Ninth Circuit misapplied the facts to the law, which is both incorrect and undeserving of review by this Court.

II. Supreme Court Precedent

> Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government and among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.

Brinegar v. United States, 338 U.S. 160, 180 (1949)(Jackson, J., dissenting).

Every vehicle-stop case this Court has decided requires some discretion-limiting feature, such as probable cause, reasonable suspicion, or fixed checkpoints. This Court has consistently rejected the government's attempts to secure unbridled discretion to stop and search motorists in border areas. Yet, this is the real thrust of the government's petition.

The touchstone of Fourth Amendment jurisprudence is reasonableness. *Florida v. Jimeno, 500 U.S. 248 (1991).* Reasonableness is measured objectively, by examining the totality of the circumstances. *Ohio v. Robinette, 519 U.S. 33, 37 (1996).* This Court continues to reject a bright-line rule for reasonableness, recognizing the "endless variations in the facts and circumstances implicating the Fourth Amendment." *Florida v. Royer, 460 U.S. 491 (1983).*

Traditional Fourth Amendment jurisprudence required probable cause to justify detentions and seizures; cases allowing lesser standards involve detailed balancing of all relevant factors. *See Whren v. U.S., 517 U.S. 806, 817-8 (1996).* The first decision allowing detentions and seizures on less than probable cause was *Terry v. Ohio, 392 U.S. 1 (1968),* holding that law enforcement officers may temporarily detain for investigation a person who the officers reasonably suspect has committed or is about to commit a crime. *Id. at 20-4.* The officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, warrant the intrusion." *Id. at 21.* This Court acknowledged that even a limited search "constitutes a severe, though brief, intrusion

upon cherished personal security, and it must be an annoying, frightening, and perhaps humiliating experience." *Id. at 24-5.* This Court also cautioned that the reasonable suspicion determination "becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the detached, neutral scrutiny of a judge who must evaluate the reasonableness of the particular search or seizure in light of the particular circumstances." *Id. at 21.* Justice Douglas, the lone dissenter, warned: "there have long been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand." *Id. at 39.*

In *Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973),* the government sought a ruling that the Immigration and Naturalization Act allowed automobile searches without probable cause or reasonable suspicion within one hundred miles of the border. This Court held that a roving Border Patrol unit could not search an automobile for illegal aliens simply because it was in the general vicinity of the border (the search was about 20 miles north of the border), ruling that agents must have probable cause or consent to search. *Id. at 266.* This Court recognized the important law enforcement interests at stake, but ruled:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens along long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of individuals against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Id. at 273.

In *Brown v. Texas, 443 U.S. 47 (1979),* officers spotted a suspicious-looking man walking away from another man in an alley in an El Paso neighborhood notorious for drug trafficking. When

the officers stopped the man and asked him for identification, he refused, and they arrested him. This Court reversed the man's conviction because the officer's lacked reasonable suspicion to believe he was engaged in or had engaged in criminal conduct. Id. at 52. This Court ruled that when an investigatory stop "is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Id. Thus, requiring specific, articulable facts for investigative stops does not give officers free reign to act on their own suspicions.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) is the seminal case for roving Border Patrol stops near the border. Again, the government sought unlimited and unbridled discretion for Border Patrol agents to stop vehicles within one hundred miles of the border, relying upon provisions of the Immigration and Nationality Act. Id. at 876-7,882. This Court once again balanced law enforcement interests against personal liberty and ruled that Border Patrol agents must have reasonable suspicion to justify roving-patrol-stops. Id. at 881-2. Where reasonable suspicion exists, agents may stop a vehicle and question the driver and passengers about their citizenship and immigration status and may ask for an explanation of suspicious circumstances, but any further detention or search must be based on consent or probable cause. Id. This Court ruled: "We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic" and found that "a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from the potential abuses inherent in "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." Id. at 882-3. To allow otherwise would mean that "Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 miles of the 2,000-mile border, on a city street, a busy highway, or a

desert road, without any reason to suspect that they have violated the law." Id.

This Court set forth a non-exhaustive list of factors that agents could consider: (1) known characteristics of the area; (2) previous experience of the arresting agents with criminal activity; (3) proximity of the area to the border; (4) unusual traffic patterns of the road; (5) information about recent illegal trafficking of aliens or narcotics in the area; (6) behavior of the vehicle's driver; (7) appearance of the vehicle; and (8) number, appearance, and behavior of the passengers. Id. at 884-5. This Court also ruled that the Hispanic appearance of the vehicle's occupants, standing alone, did not provide reasonable suspicion. Id. at 885-6.

Brignoni-Ponce did not set forth a minimum number of factors necessary to constitute reasonable suspicion or any outcome determinative criteria. Such an approach would be antithetical to a totality-of-the-circumstances inquiry. *United States v. Lopez-Martinez, 25 F.3d 1481, 1484 (10th Cir. 1994).* A vital element of the *Brignoni-Ponce* test is whether the agent had reason to believe that the vehicle in question had come from the border. *United States v. Escamilla, 560 F.2d 1229, 1232 (5th Cir. 1977). Compare United States v. Lopez, 564 F.2d 710, 712 (5th Cir. 1977)("... when law enforcement agents interdict those traveling purely within this country, we must be extremely careful to ensure that reasonable suspicion does exist, even if the stop is close to the border).*

United States v. Martinez-Fuerte, 428 U.S. 543 (1976), ruled that fixed-checkpoint stops are constitutional because they only minimally intrude upon motorists and contrasted the greater intrusion of individualized vehicle stops and their potential for abuse:

> Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of the location of the

> checkpoints and will not be stopped elsewhere.[4] Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. ...

Id. at 559.

In *Delaware v. Prouse, 440 U.S. 648, 663 (1979),* this Court extended the reasonable suspicion requirement to all automobile users, ruling that the Fourth Amendment prohibits randomly stopping an automobile and detaining the driver in order to check the driver's license and automobile registration. This Court commented:

> We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety.

Id. at 657. Thus, subjecting automobile users to unfettered government discretion would seriously circumscribe the Fourth Amendment. *Id. at 663.*

In *Reid v. Georgia, 448 U.S. 438 (1980),* this Court examined a DEA airport stop of a traveler

[4]This sentence suggests that motorists who do not care to submit to checkpoints may evade them without adverse consequences. This is consistent with *Florida v. Royer, 460 U.S. at 498.*

based upon a drug courier profile, including: (1) defendant arrived from Fort Lauderdale, a cocaine source city; (2) defendant arrived early in the morning when law enforcement activity is diminished;[5] (3) defendant and his companion appeared to be trying conceal the fact they were traveling together; and (4) they carried no luggage except their shoulder bags. This Court ruled the agent did not have reasonable suspicion, finding that these circumstances described a large number of "presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as this would justify a seizure." *Id. at 440-1.*

United States v. Cortez, 449 U.S. 411 (1981) examined the stop of a vehicle which Border Patrol agents suspected contained illegal aliens. Agents followed distinctive "chevron" footprints on numerous occasions, deducing "chevron" was an alien smuggler; they identified a near-by load site and deduced a pattern of transport, then stopped a pickup with a camper they believed "chevron" might be driving, which had made a round trip in the area within a short period of time – between 4:30 and 6:30 a.m.. *Id. at 412-4.* This Court ruled the agents had reasonable suspicion for the stop, courts should take into account all of the circumstances, and there must be a particularized showing that this person is engaged in wrongdoing. *Id. at 418-9.* The opinion recognized the difficulties of patrolling the long, open border with Mexico but nevertheless emphasized the need for specificity of information. *Id.* Although agents may assess facts in light of their experience, hunches or instincts cannot form the basis of reasonable suspicion. *Id. at 419.* And, reasonable suspicion, like probable cause, is dependent upon the content of information possessed by the police and its degree of reliability – both quantity and quality are considered in the totality of the circumstances. Although conduct that does not necessarily indicate criminal activity may sometimes be relevant to the

[5]This is analogous to the government's shift change claim in this case.

reasonable suspicion inquiry, in light of the agents' experience, and the agents' background may provide a backdrop to assess the relevant facts, the inferences agents draw must be objectively reasonable. Id. at 418.

Florida v. Royer, 460 U.S. 491, 498 (1983) held that when an officer, without reasonable suspicion, approaches an individual, that person has the right to refuse to cooperate, ignore the police, and go about his business. *Compare Illinois v. Wardlow, 528 U.S. 119, 124-6 (2000)(holding that unprovoked flight from police officers, which is the consummate act of evasion, in a high crime neighborhood furnishes reasonable suspicion).*

In *United States v. Sokolow, 490 U.S. 1 (1989),* this Court again examined reasonable suspicion based upon a combination of factors, including probabilistic drug courier profile evidence and evidence of on-going criminal behavior, casting particularized suspicion upon the suspect. This Court reiterated that reasonable suspicion is neither easily nor usefully reduced to a "neat set of legal rules" and that to evaluate stops, courts must "consider the totality of the circumstances – the whole picture." Id. at 7. This Court emphasized that officers must have more an "inchoate unparticularized suspicion or hunch." Id. at 7. Any one of the factors the agent relied upon, including travel under an alias, was not, by itself, proof of illegal conduct, and was consistent with innocent travel, but taken together they amounted to reasonable suspicion. Id. Agents must articulate factors, but some of the factors may be set forth in a profile. Id. at 10.

In *Ornelas v. United States, 517 U.S. 690 (1996),* this Court established a *de novo* standard of review for reasonable suspicion and probable cause issues, emphasizing that reasonable suspicion is a "fluid concept" which takes its meaning from the context in which it is assessed and that it is not possible to articulate its meaning precisely. Id. at 695-6. This Court stated one of the policy reasons

for *de novo* review:

> Finally, *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined "'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"

Id. at 697 (internal citations omitted). This Court also acknowledged that because the reasonable suspicion inquiry is so fact-specific, "one determination will seldom be a useful precedent for another." Id. at 698 (internal citation omitted). But, this Court noted, there are exceptions, comparing *Sokolow* and *Royer*. Ninth Circuit jurisprudence (set forth below on pages 19-20) shows that there are many similarities between cases and one case can offer guidance for other similar encounters.

This Court continues to protect automobile drivers from unreasonable searches and seizures. *Knowles v. Iowa, 525 U.S.113 (1998)* held that officers cannot search a vehicle where the driver was stopped for speeding and issued a citation. This Court declined to extend the bright-line search incident to arrest rule to non-arrest situations because citation-only stops present less concern for officer safety and no concern for preserving evidence. Id. at 488.

Most recently, Justice O'Connor wrote:

> While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections. What the *Terry* rule lacks in precision it makes up for in fidelity to the Fourth Amendment's command of reasonableness and sensitivity to the competing values protected by that Amendment. Over the past
>
> 30 years, it appears that the Terry rule has been workable and easily applied by officers on the street.

Atwater v. City of Lago Vista et. al.,___S.Ct. ___, 20001 WL 408925 (April 24, 2001)(O'Connor,

J., dissenting).

III. Analysis in this Case, Precedent in the Ninth Circuit and Other Circuits

The Ninth Circuit followed the totality-of-the-circumstances test this Court set forth in *Brignoni-Ponce.* The opinion does not hold that agents cannot consider the totality of the circumstances. Instead, the Ninth Circuit examined all of the factors Agent Stoddard considered and ruled that some of the factors had no weight, under the circumstances of this case, and the remaining factors were entitled to some weight, but when considered collectively did not give rise to reasonable suspicion. This is just what reviewing courts are supposed to do – determine the relevance of factors relied upon, what weight the factors carry, and then decide whether there was reasonable suspicion in light of the weight and relevance of all of the factors. Otherwise, agents could use a variety of meaningless factors to justify stops founded on less than reasonable suspicion. Agents are still free to consider the whole picture. The Ninth Circuit did not abrogate or narrow the totality-of-the-circumstances test.

Agents in the field may, and should, consider everything. But considering everything and saying that a factor – just because an agent considered it – should be entitled to some weight are entirely different things. An agent could believe that an African-American man looked like he did not 'belong' in a Cadillac and might consider that fact suspicious. Although considered by the agent, no court would condone the use of such a factor in any reasonable suspicion calculus. *See United States v. Armstrong, 517 U.S. 456 (1996); Brignoni-Ponce, 422 U.S. at 886-7 (holding Hispanic appearance alone is insufficient to justify a stop); Brown v. City of Oneonta, New York, 235 F.3d 769, 776 (2d Cir. 2000); United States v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000), cert. denied, 121 S.Ct. 211 (2000).* There must be an objectively reasonable basis to conclude that a

factor, alone or in combination, was suspicious; therefore, courts must determine whether an agent's reliance on a given factor or factors was objectively reasonable.

Comparison to another frequently-litigated area of law using a totality-of-the-circumstances approach is illustrative. Courts must examine the totality of the circumstances in determining the voluntariness of a defendant's statement. Yet no one would seriously argue that just because the defense listed ten weak or irrelevant factors supporting involuntariness, that courts must attribute weight to all of them and find a statement involuntary.

As the Ninth Circuit opinion states, reasonable suspicion is not a numbers game. *(232 F.3d at 1247, n.8).* It does not mean that agents may recite any list of factors and, if they reach a magic number – eight, ten, twelve, the stop is automatically upheld. The opinion recognizes that different factors have different levels of significance, depending upon their context: "Thus, where a stop is based upon a number of factors, each of which carries only minimal probative weight, quantity does not necessarily make up for the lack of quality." *(232 F.3d at 1247, n.8).* And although *Sokolow* teaches that the sum of conduct can be greater than its individual components, adding together factors which are "zeroes" can never equal reasonable suspicion. The Ninth Circuit's approach is just what is required – determining whether the combination of factors the agent relied upon amounts to reasonable suspicion. The innocuous and generalized factors in this case described a large number of innocent motorists and did not focus suspicion upon Mr. Arvizu.

The totality-of-the-circumstances test does not obligate courts to attribute weight to a factor that has no probative value.[6] The opinion merely repeated what the Ninth Circuit has often held –

[6] For example, given demographic changes, Hispanic appearance is of such little probative value that it may not be considered in a reasonable suspicion inquiry in areas where Hispanic residents comprise a substantial portion of the population. *Montero-Camargo, 208 F.3d at 1131.*

when the flip side of a factor is used against a defendant, then it is a no-win situation – "heads I win, tails you lose." *Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994).* Factors that have such low probative value that no reasonable officer would have objectively relied upon them to make an investigative stop should be disregarded. The Ninth Circuit is not the only circuit to criticize repeated use of factors with no probative value. *See United States v. Lopez, 564 F.2d 710 (5th Cir. 1977)(criticizing factor of trunk riding high: "... the border patrol's position seems to be 'Riding high or riding low, either way a-searching we will go.'").*

The Ninth Circuit skeptically reviews oft-cited claims that equate innocuous conduct with suspicious activity. *See United States v. Garcia-Camacho, 53 F.3d 244,247 n.5. (9th Cir. 1995)("It is not difficult to imagine the government one day arguing that driving at constant speed constitutes suspicious conduct because the best way to evade Border Patrol agents is not to stand out by going faster or slower than the normal flow of traffic."); United States v. Montero-Camargo, 208 F.3d at 1136 ("[i]t is, in fact, difficult to imagine what [Defendant] could have done at that point that might not have appeared suspicious to a Border Patrol agent.").* The Ninth Circuit has repeatedly cautioned against "mere rote citations of factors which were held, in some past situations, to have generated reasonable suspicion, leading us to defer to the supervening wisdom of a case now before us." *United States v. Rodriguez, 976 F.2d 592, 594 (9th Cir. 1992).*

The factor-by-factor analysis the Ninth Circuit conducted in this case follows this Court's precedent and is not unique. The Ninth Circuit has conducted factor-by-factor analysis in numerous cases. *See Rodriguez, 976 F.2d 592: (finding no reasonable suspicion where the location was a "notorious" alien smuggling route, defendant did not acknowledge the agents, the car was the kind which could be used for smuggling, defendant looked at the agents several times in his rear view*

mirror, the car appeared to be heavily loaded, defendant was Hispanic.); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418-21 (9th Cir. 1989)(rejecting a stop based upon the nervous demeanor of defendant and the passengers, the driver's reduction of speed when the police vehicle approached, a two-way antenna on the vehicle's trunk, defendant's residence along the Mexican border in the Monte Carlo neighborhood which was under investigation for recent narcotics activity [there was no indication that the particular address on the vehicle's registration was under investigation], a license plate bracket indicating the car had been purchased from a dealership associated with drug trafficking, and the vehicle's large trunk.); Garcia-Camacho, 53 F.3d at 246-9)(finding no reasonable suspicion even though Interstate 5 is the quickest route for illegal aliens, defendants looked straight ahead and did not acknowledge the agents, the truck was of a kind that could be used for alien smuggling, the truck appeared heavily loaded, defendants were Hispanic males, fast driving, acceleration when defendants passed the agent's car, a lane change near the agent, the passenger had a surprised and terrified look on his face when he passed the agents, and the truck did not pull over for one and one half miles – finding that each of the factors could just as easily apply to law-abiding citizens); United States v. Jiminez-Medina, 173 F.3d 752 (9th Cir. 1999)(no reasonable suspicion despite the type of vehicle, the driver's preoccupation, the vehicle's slow speed, the vehicle's registration, Interstate 10's reputation as a corridor for alien smuggling, and the time of evening, stating: "[t]he law of this circuit teaches that the presence of such facts as driver preoccupation, slow speed, movement within one's own lane of traffic, and even coming from the wrong neighborhood do not give rise to legally sufficient "reasonable suspicion.").

Other circuits have also employed this same method of analysis. *See United States v. Buenaventura-Ariza, 615 F2d 29, 34-7 (2d Cir. 1980)(holding there was no reasonable suspicion*

under the totality of the circumstances in a DEA airport stop; the court examined each of the factors individually, finding that arrival from a source city, nervousness, failure to travel side by side, and failure to converse while walking though terminal were wholly insufficient and were not sufficiently unusual to create reasonable suspicion.); United States v. Kithcart, 134 F.3d 529 (3d Cir. 1998, rev'd on other grounds, 218 F.3d 213 (2000)(order remanding to district court to examine totality of circumstances surrounding stop, specifically requiring district court to consider each of the factors the government offered to support the stop); United States v. Brugal, 209 F.3d 353, 358 (4th Cir. 2000)(en banc), cert. denied, 121 S.Ct. 388 (2000)(examined individually the eleven factors the government offered for suspects' continued detention at checkpoint, including 3:30 a.m. travel time and defendant's claim that he was stopping for gas even though he had one quarter tank, he had just passed two well-marked gas stations, and gas station was not visible from freeway exit, finding that the articulated factors "in their totality ... eliminate a substantial portion of innocent travelers" and, therefore, there was reasonable suspicion); United States v. Moreno-Chaparro, 180 F.3d 629, 631-2 (5th Cir. 1998)(the court examined each factor the agent offered and found no reasonable suspicion where driver was 60 miles north of border at 2:00 p.m. [known to be border patrol shift change], was a male driving a car registered to a female, the vehicle type -- a Chevrolet truck, and the driver slowed down to look at the checkpoint and seemed surprised to see an officer there, ruling that it would be "manifestly unreasonable to target every Chevrolet pickup truck driven on Texas highways" and finding that each factor the government relied upon was "unremarkable and unsuspicious."); United States v. Jerez, 108 F.3d 684, 693-4 (7th Cir. 1997)(the court examined each factor articulated by officers, including two-door "target" vehicle, license plates from a source state, vehicle was parked near an airport and the interstate, and a criminal history check showed

a suspended driver's license and an arrest or conviction for smuggling contraband into a Florida jail, determining there was no reasonable suspicion, noting the first three factors would be true of innocent travelers and although innocent factors taken together can support reasonable suspicion, they did not here); United States v. Bloomfield, 24 F.3d 1043, 1047-8 (8th Cir. 1994)(en banc)(court conducted a factor-by-factor analysis holding there was no reasonable suspicion for defendant's continued detention after being stopped for an unlawful lane change based upon defendant's hands shaking and nervous appearance, red eyes, opening the truck door only partially upon exiting, a strong deodorant smell emanating from the truck, and defendant had a pager, commenting that: "conduct typical of a broad category of innocent people provides a weak basis for suspicion."); United States v. De La Cruz-Tapia, 162 F.3d 1275, 1276-80 (10th Cir. 1998)(court conducted a factor-by-factor approach holding defendant's lack of eye contact, abrupt exit from highway, activities at gas station, age and size of defendant's car, and fact that the car had crossed the United States-Mexico border three times in three days did not establish reasonable suspicion); United States v. Tapia, 912 F.2d 1367 (11th Cir. 1990)(holding that factors such as being Mexican, having few pieces of luggage, being visibly nervous or shaken upon encounter with police, and traveling on the interstate with out-of-state plates did not provide a minimal, particularized basis for reasonable suspicion for further detaining defendants after a speeding citation, even when considered together, cautioning that "in formulating such common-sense conclusions, neither police officers nor courts should sanction as 'reasonably suspicious' a combination of factors that could plausibly describe the behavior of a large portion of motorists engaged in travel upon our interstate highways.").

Here, the Ninth Circuit's opinion considered all of the circumstances, including all of the factors the government offered to support the stop, examined the record in detail, and correctly

determined that seven factors the district court relied upon had no objectively reasonable basis and added no level of suspicion to the equation. This did not create a new rule of law. Instead, the opinion painstakingly set forth a detailed analysis explaining why each of the seven factors was not objectively reasonable and did not add anything to the reasonable suspicion inquiry under the circumstances of this case.

IV. Factors in this Case

One, the minivan slowed as it approached the border patrol vehicle.[7] The opinion concludes that slowing down in the presence of law enforcement officers is a perfectly normal response that does not indicate criminal activity – a fact the Ninth Circuit has repeatedly acknowledged. *See Hernandez-Alvarado, 891 F.2d at 1419; Garcia-Camacho, 53 F.3d at 247.* The government's petition ignores the well-documented fact that law-abiding people become nervous when they encounter law enforcement officers. Id. Moreover, Agent Stoddard only guessed Mr. Arvizu's speed and admitted he did not stop Mr. Arvizu's vehicle for a traffic violation. In other words, the Ninth Circuit concluded that, under the facts of this case, there was no objectively reasonable basis to believe this fact was suspicious of criminal activity. The Fifth Circuit has also recognized that slowing down after a marked patrol unit turns to follow is not unusual and is the expected reaction. *United States v. Diaz, 977 F.2d 163, 165 (5th Cir. 1992); United States v. Samaguey, 180 F.3d 195, 197-8 (5th Cir. 1999)(the court found reasonable suspicion but cautioned that slowing down upon seeing an agent is cautious driving and due little weight, that driver's deceleration and swerving*

[7] The government also complains of the van's "abrupt" turn. But Agent Stoddard could not characterize the driving as evasive or dangerous and did not stop Mr. Arvizu for traffic reasons. Also, the "turn" took place at a "T" junction and Mr. Arvizu signaled well in advance of turning. (Tr. 12/8/98 20-1,44-5,54,71).

was entitled to little or no weight, and overall, the driving behavior weighed only slightly in favor of reasonableness.).

Two, Mr. Arvizu's failure to acknowledge Agent Stoddard. Here, Agent Stoddard's testimony took this boilerplate claim one step further by claiming that area residents normally smile and wave at him. (RT42,ER72). The Ninth Circuit has long recognized that a person's failure to acknowledge a law enforcement officer does not ordinarily provide a basis for suspecting criminal activity. Id. This is also consistent with this Court's recognition in *Royer* that people have the right to go about their business and ignore police contact when there is no reasonable suspicion. Thus, the opinion correctly noted that there was nothing "out of the ordinary" to convert this fact into a suspicious circumstance. The Fifth Circuit has also ruled that failure to make eye contact with agents is not objectively suspicious and so cannot weigh in the reasonable suspicion calculus. *Escamilla, 560 F.2d at 1233 (failure to look or wave at the agents deserves no consideration); United States v. Lopez, 564 F.2d at 712 (noting that failure to make eye contact with strangers is so commonplace that it may be the rule rather than the exception).*

The government's petition also tries to convert Agent Stoddard's failure to recognize the van as a local vehicle into a suspicious factor. (Pg. 16-7). The Ninth Circuit ruled that in this case, it was not relevant because "evidence introduced at the suppression hearing made it clear that the area in question is one that is used for many purposes by different kinds of people – local residents ... and tourists.... Accordingly, it is not surprising that a Border Patrol agent would not recognize every passing car." *(232 F.3d at 1249-50); Contrast United States v. Hernandez-Gonzalez, 608 F.2d 1240, 1243 (9th Cir. 1979)(finding agent's failure to recognize car or its occupants on lightly-traveled road was a factor contributing to reasonable suspicion).* Thus, there was no objective basis in this

case to believe that use of the road by someone other than a local resident was suspicious of criminal activity.

Three, the children waved in a manner the agent believed was abnormal. The government's characterization of the waving as abnormal and, therefore, a factor bearing upon reasonable suspicion overlooks the obvious – that the abnormal behavior should be on the part of the person suspected of engaging in criminal activity. And there was no basis for Agent Stoddard's supposition that the children had been coached to wave. Although there is no precedent for this factor, the opinion recognized it as a classic case of "damned if you do, equally damned if you don't."[8] Agent Stoddard had barely finished criticizing the adults for not waving, when he testified that it was suspicious that the children were waving. The opinion notes this incongruity, then remarks that because children are well-known to act impetuously and in ways that embarrass their parents, the children's waving here did not objectively contribute to reasonable suspicion. The totality-of-the-circumstances analysis does not circumvent common sense observations such as these.

Four, different agents had stopped one minivan containing marijuana along the same route during the month before this arrest.[9] The opinion correctly rules that one stop of a similar vehicle cannot taint all minivans – another common sense observation. Also, because Agent Stoddard

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[8]The Ninth Circuit has often criticized the "heads I win, tails you lose" approach to reasonable suspicion factors. *See Gonzalez-Rivera, 22 F.3d at 1446-7; Montero-Camargo, 208 F.3d at 1136.* The Fifth Circuit has also condemned this practice. *See Escamilla, 560 F.2d at 1233 (finding that because a previous opinion found a driver's repeated and nervous glances at the agent suspicious, an opinion holding a driver's failure to look was also suspicious would put officers in a classic "heads I win, tails you lose" position and the driver could only lose); Moreno-Chaparro, 180 F.2d 629.*

[9] The earlier incident clearly was not connected with this case. (12/7/98 Tr12,38-9).

stopped the van in this case for immigration reasons, not because he believed it contained drugs, this factor seems to have been thrown into the mix after-the-fact as "window dressing" and could not have been part of the reason Agent Stoddard made the stop. There was nothing unusual about this minivan. It had a valid registration, did not appear to be riding low as if heavily laden, the windows were not obstructed, and there was no indication it had recently crossed the border. Thus, under the circumstances of this case, it was not objectively suspicious that a minivan would be driving on this road, adjacent to a popular recreation area, in broad daylight..

Five, Agent Stoddard did not recognize the minivan as belonging to a local resident. Given the totality of the circumstances here, which included ample evidence that the route of travel encompassed a multi-use area frequented by non-local Douglas area residents (30 miles away), this factor is not objectively suspicious. None of the cases the government cited involved travel in a multi-use area adjacent to a National Forest or Monument.

Six, the registration check revealed a valid registration to Leticia Arvizu at an address on a Douglas street characterized as "notorious" for alien smuggling. Living in the wrong neighborhood, however, does not subject a person to unlawful stops and searches. *Jiminez-Medina, 173 F.3d at 755.* Agent Stoddard lacked even a shred of negative information about Leticia Arvizu and her Douglas address – another factor that negates reasonable suspicion. It is improper to forever cast a net of suspicion over the Arvizus and other Douglas residents merely because they live in an area that is "notorious" for alien smuggling. It is difficult to imagine living in an area in Douglas or Nogales – two of Arizona's largest border cities – that Border Patrol would not describe as "notorious" for smuggling activity. The Ninth Circuit, which receives a good many border cases, is in a position to recognize this fact. The opinion also notes the lack of foundation for Agent Stoddard's opinion that

the address was in a high-crime area and, accordingly, finds the district court's reliance upon it similarly misplaced. This factor was not objectively suspicious.

And seven, the children's knees were slightly raised – a fact Agent Stoddard claims he saw either when the van quickly passed in front of his vehi~~cle or while follo~~wing it from behind. The opinion, again using common sense, determined that this factor was equally, if not more consistent, with innocent explanations, such as camping and picnic equipment. The factor did not add suspicion because it was too common to be meaningful, not because there was only a possible innocent explanation, as the government claims. In other words, this factor was not probative of anything.

The government's petition states that "the apparent presence of a substantial amount of cargo" in a vehicle supports reasonable suspicion. (Pg.18-9). The cited cases, without exception, refer to vehicles riding low that appear heavily-laden. Mr. Arvizu's van was not riding low and it is too much to infer alien smuggling from children sitting with their knees lower than chest level. If anything, the agent's observations should have completely negated any suspicion in this regard because the fact that the vehicle was not riding low meant that there could be no weighty cargo for the children's feet to be resting on.

The opinion correctly determined that these seven factors were not objectively suspicious, given the totality of the circumstances in this case, and that the district court erroneously relied upon them. The opinion did not hold, as a matter of law, that all of these factors would be irrelevant in other cases.[10] The factors were of zero probative value in this case. The government cannot

[10]The opinion ruled that the following factors should not be considered, based upon Ninth Circuit precedent: (1) the minivan slowing down as it approached the Border Patrol vehicle; *(232 F.3d at 1249-50)*; and (2) the vehicle's registration to a Douglas address in a block notorious for smuggling. *(232 F.3d at 1250)*. The opinion ruled the other five factors were not relevant in this case.

transform a baseless stop into one based upon reasonable suspicion by simply aggregating any number of "zeroes."

The Ninth Circuit correctly decided that the weight given to the remaining four factors, in combination, fell short of reasonable suspicion. Those factors are: (1) shift change; (2) a minivan; (3) the road could be used for checkpoint evasion; and (4) the road was sometimes used by smugglers.

First, the shift change factor does not warrant much discussion. It is hard to believe that traveling from Douglas, Arizona through an adjacent recreational area at 2:15 p.m., in broad daylight, could be characterized as unusual or suspicious. Yet Agent Stoddard and the district court paired this time with a 3:00 p.m. Border Patrol shift change, which the agent claimed is common knowledge amongst smugglers seeking to avoid Border Patrol. This claim makes no sense because the stop occurred a distant forty-five minutes before shift change and Agent Stoddard testified that agents might use Leslie Canyon Road (the route Mr. Arvizu traveled) to return to the checkpoint for shift change, making travel along it likely to draw the attention of Border Patrol. Under the government's view, it is unwise for area residents to travel anywhere within one hour of shift changes, some six hours per day, lest their activities be interpreted as suspicious. A net this wide would capture a significant portion of the day. The Fifth Circuit recently found: "While we may empathize with the Border Patrol's concerns regarding increased exposure during times of reduced manpower, we are not willing to sacrifice the constitutional protections of drivers to lessen perceived adverse impact resulting from the decision of the Border Patrol to change shifts at the same time everyday." *Montero-Chaparro, 180 F.3d at 629.*

Second, the minivan factor can also be quickly dismissed because smugglers prefer whatever

vehicle is roomy enough to hide aliens or contraband. There is nothing about a minivan that suggests illegal activity – especially a mini-van with a male driving, an adult female passenger, and three children – a typical family. Because minivans are popular family cars, this factor adds little, perhaps nothing, to the equation. Moreover, agents have depicted whole classes of vehicles as suspicious, depending upon the case – pickup trucks, vans, cars with big trunks, Monte Carlos – so, the list could continue indefinitely.[11] Similarly, Agent Stoddard's failure to recognize Mr. Arvizu's van as a local vehicle adds nothing, especially given the agent's conceded lack of familiarity with the area and the fact that non-locals use the area for recreation. Thus, there is no objectively reasonable basis for determining that a minivan in the area in the middle of the day was suspicious.

Agent Stoddard did not testify that the van appeared to be riding low or was heavily loaded – a detail he certainly would have noticed if the road was as rough and bumpy as he claimed. The appearance of a heavily-laden vehicle is a factor commonly observed by agents and appears throughout reasonable suspicion cases. *See e.g. Brignoni-Ponce, 422 U.S. at 885; United States v. Harrington, 636 F.2d 1182, 1184 (9th Cir. 1980); See also United States v. Medina-Gasca, 739 F.2d 1451 (9th Cir. 1984) (finding multiple factors supported reasonable suspicion including observation of two vans traveling together that appeared to be riding low as if heavily laden with possible illegal aliens).* The absence of this fact, therefore, negated suspicion.

Third, the claimed checkpoint evasion likewise adds little to the equation. Driving a route that avoids a checkpoint, without other indicia of illegal activity, cannot be used to justify a stop. *United States v. Ogilvie, 527 F.2d 330 (9th Cir. 1975).* In *Ogilvie*, a defendant drove within sight

[11]Every type of car imaginable has been described as commonly used for smuggling. *See United States v. Rodriguez, 976 F.2d 592, 596 (9th Cir. 1992)("We may confidently assert that all types of vehicles have been used in smuggling operations at some place.").*

of a Border Patrol checkpoint, exited the highway, crossed the overpass, then returned to the interstate, having driven around the checkpoint -- a clear and obvious checkpoint evasion. The Ninth Circuit ruled that avoiding a checkpoint, without more, did not give rise to reasonable suspicion. *Id. at 331-2.* This is consistent with *Royer,* where an individual is free to go about his business, and *Martinez-Fuerte*, which suggests one reason checkpoints are reasonable under the Fourth Amendment is because people will know about them and can avoid them.

But unlike *Ogilvie,* this case is not a clear, or even probable, example of checkpoint evasion. Although the route could have been used to avoid the checkpoint, there were many legitimate destinations along the route Mr. Arvizu traveled – even after making the last turn onto Kuykendall Cutoff Road. The district court did not rule that the only reason or a likely reason a vehicle would be traveling along Kuykendall Cutoff Road at 2:15 p.m. was to evade the checkpoint. Such a finding would not have been supported by the facts. But this is precisely what the government urges. The district court merely determined that the next recreation area was "quite a few miles to the north" and also accessible via a paved road, I-181. (RT135-6;ER 165-6). Finally, the local vehicle registration provided a valid reason for the van to be in the area. The government's reliance upon checkpoint evasion as a factor is misplaced because there was no clear checkpoint evasion and the inferences drawn from the mere possibility of checkpoint evasion do not add much, if anything, to the reasonable suspicion inquiry.

Fourth, the road was sometimes used by smugglers. This factor has low probative value. It provides background, but little else. Basing reasonable suspicion upon this factor would mean that sightseers traveling in areas where smuggling activity takes place would be subject to random stops and searches, effectively zoning our border areas into reasonable suspicion zones.

Courts should examine all factors, including those which do not support reasonable suspicion. *See Gonzalez-Rivera, 22 F.3d at 1447(defendants' IHOP uniforms, lack of evasion, and the normal appearance of the car were factors weighing against reasonable suspicion).* The government's analysis ignores facts which squarely refute its claims of remoteness and the lack of legitimate destinations along the route Mr. Arvizu traveled.

V. Summary

Districts from areas along the United States-Mexico border are unique. The Fifth and Ninth Circuits address a lion's share of the roving- patrol-stop cases and have identified patterns of agents repeatedly flip-flopping on whether a factor or its opposite is suspicious and repeatedly parroting the same boilerplate factors to justify stops where reasonable suspicion was lacking. These courts are in a unique position to assess which factors are relevant, which factors are consistently being abused, and how these factors should weigh in the reasonable suspicion inquiry. The Ninth Circuit's opinion does exactly what this Court directed in *Ornelas:* it provides the explicit guidance necessary for the growing law enforcement presence along the border.

The Fourth Amendment protects innocent, law-abiding persons, who have the right to go about their business without interruption, delay, or unwarranted intrusion, from overbearing or harassing police conduct carried out solely on the basis of arbitrariness and imprecise stereotypes. *Terry at 14-5.* We currently have no way of knowing how many innocent people are subjected to suspicionless stops.[12] Citizens who have been stopped pointlessly are largely invisible. The

[12]*Almeida-Sanchez, 413 U.S. 273, n.5 ("... there is no telling how many perfectly innocent drivers have been stopped on this road without any probable cause, and been subjected to a search in the trunks, under the hoods, and behind the rear seats of their automobiles."); United States v. Guerrero-Barajas, 240 F.3d 428, 436 (5thCir. 2001), reh. denied, ___ F.3d ___(Mar.19, 2001)(J.Dennis, dissenting).*

exclusionary rule does not apply to them and they are unlikely to bring civil suits. The United States-Mexico border is the setting for an ever-increasing force of Border Patrol agents. As of September, 1998 approximately 7,357 Border Patrol agents patrolled our 1,945-mile of border with Mexico compared with 289 patrolling our 3,987-mile border with Canada. *K.Johnson, The Case Against Race Profiling in Immigration Enforcement, 78 Wash.U.L.Q. 675, 736 n.295 (Fall, 2000).* The number of Border Patrol agents along the United States-Mexico border has steadily increased since 1998.[13]

The government's claim that the decision overly burdens law enforcement officers is absurd. Holding agents to reasonable suspicion does not create an undue burden. In fact, police already have considerable discretion to stop. And because courts are not permitted to inquire into the subjective motives of police officers who make traffic stops, it is difficult to uncover pretextual stops. *Whren v. United States, 517 U.S. 806 (1996).*

The government's petition insinuates that the Ninth Circuit has on numerous occasions flouted this Court's reasonable suspicion precedent, requiring redress from this Court. This is a far cry from reality. In truth, the Ninth Circuit has conscientiously applied the law set forth by this Court in *Brignoni-Ponce* and *Cortez.* It is not surprising that Ninth Circuit jurisprudence generates landmark decisions when one considers the large border areas falling within its jurisdiction (the government's petition asserts that two-thirds of Border Patrol apprehensions occur within the Ninth Circuit). The Ninth Circuit is in the best position to identify patterns, detect abuses, and to publish

[13]The Executive Summary of the President's Fiscal 2002 Immigration Budget, prepared by the Office of Public Affairs, INS, on April 9, 2001 states that the Fiscal Year 2002 Budget plans to increase the number of Border Patrol agents by 570 to a record level of more than 10,000 agents, which is more than double the level in Fiscal Year 1993.

opinions setting forth fact-specific patterns in reasonable suspicion cases – as occurred in this case. The opinion here did not narrow the totality-of-the-circumstances test as the government claims; instead, it provides explicit guidance to those involved in roving-patrol stops.

The "reasonable suspicion" doctrine is based upon notions of liberty and freedom from state intrusion in a mobile society and "must be founded on an objective basis for suspecting that a particular person is engaged in criminal activity, lest we "sweep many ordinary citizens into a generality of suspicious appearance merely on hunch." *Jiminez-Medina, 173 F.3d at* 755, (*citing Rodriguez, 976 F.2d at 596*). Every factor the government offers in this case falls into the same category: innocent behavior which is not consistent with criminal activity. The flip side of each factor would also support reasonable suspicion. The government's arguments would place motorists in Southern Arizona in a "lose, lose" situation – intruding upon their liberty whether they engage in conduct or avoid it. The Ninth Circuit did in this case what this Court directed and what it has done in so many others – found no reasonable suspicion where the factors indicated by Border Patrol do not provide an objectively reasonable basis for singling out a citizen as being engaged in criminal activity, but instead encompass a large number of innocent people. In, *Hernandez-Alvarado, 891 F.2d at 1420 (J. Alarcon, concurring opinion),* Judge Alarcon wrote:

> To uphold the district court's order, we would have to condone random detention and searches of a large number of American residents simply because they live in a depressed crime ridden border area, drive old cars, when accompanied by their families, and look straight ahead after seeing a law enforcement vehicle.... We are compelled to reverse the district court's order upholding the detention of presumably innocent travelers.

The government asks for unlimited discretion under the guise of reasonable suspicion – a border exception to the Fourth Amendment -- claiming that a list of factors agents submit should be

automatically accepted by reviewing courts, even though the factors are innocuous and do not implicate the detained person in criminal activity. The government asks for a subjective, not objective test – an approach this Court has squarely prohibited. The Ninth Circuit opinion simply follows this Court's precedents and requires that government agents have objectively reasonable suspicion to stop a vehicle, something which *Terry* recognized reduces the risk of intrusive and arbitrary law enforcement contact with law-abiding people to acceptable levels.

CONCLUSION

Although reasonable suspicion stops may impact some innocent people, the government would cast an unconscionably large net of suspicion over all Southern Arizona residents. This Court has repeatedly declined to give Border Patrol agents unbridled discretion to stop motorists during roving patrols. The factors Agent Stoddard articulated in this case describe a large number of innocent motorists who could be randomly detained. The Ninth Circuit opinion correctly applies the totality-of-the-circumstances standard this Court has developed and refined during the past two decades. The opinion applies well-settled rules and examines all of the factors the district court considered in the context of the particular facts of this case. Seven factors the district court relied upon added nothing to the reasonable suspicion equation because it was not objectively reasonable to view the factors as suspicious given the facts of this case. The remaining four factors, although relevant, were too weak to provide reasonable suspicion to stop Mr. Arvizu's vehicle. The combination of factors provided no reasonably objective basis to suspect that the driver was engaged in criminal activity. This Court should deny the government's petition for certiorari because the opinion, while correctly applying this Court's reasonable suspicion analysis, simply holds that Agent Stoddard lacked reasonable suspicion to stop Mr. Arvizu. The opinion correctly set forth the applicable law, did not create a circuit conflict, did not change Supreme Court precedent, and correctly applied the facts to the law.

RESPECTFULLY SUBMITTED: May 3, 2001

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Attorney for Respondent

APPENDIX A

LEGEND: MAP OF DOUGLAS, CHIRICAHUA MOUNTAIN AREA

Notations:

The blue highlighted area depicts Mr. Arvizu's route of travel.

#1 marks the Border Patrol Checkpoint at the intersection of Rucker Canyon Road and Highway 191.

#2 marks the approximate location of Border Patrol sensors.

#3 marks the approximate area where Mr. Arvizu's van passed Border Patrol Agent Stoddard's stationary vehicle.

#4 marks the approximate area where the Agent Stoddard stopped Mr. Arvizu's van.

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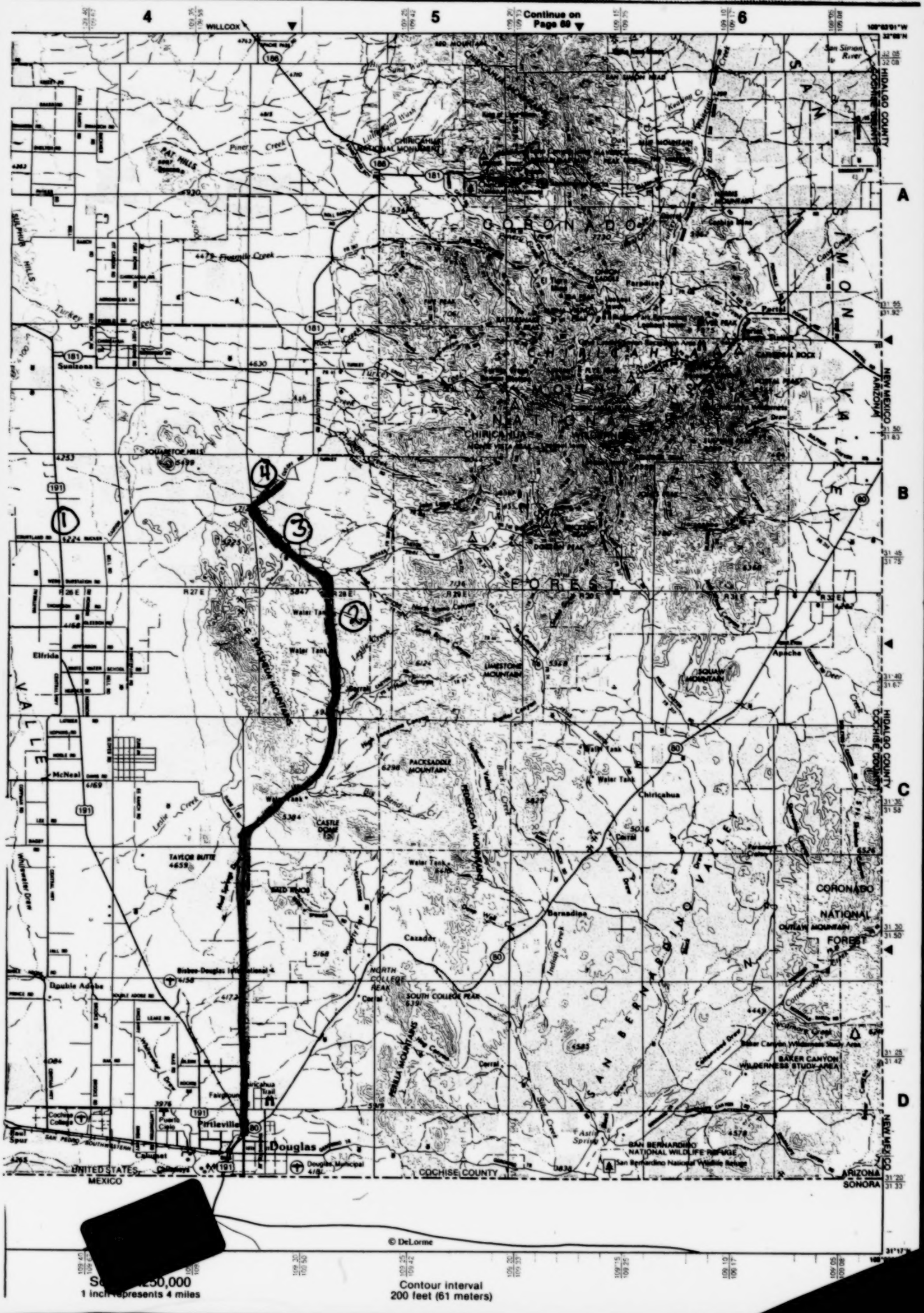

FILED

MAY 14 2001

OFFICE OF THE CLERK

No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 00-1519

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals in this case "circumscribed," "as a matter of law" (Pet. App. 11a, 14a), the facts that law enforcement officers may consider when determining whether there is reasonable suspicion of illegal activity. The court of appeals' categorical exclusion of certain types of facts from the reasonable-suspicion calculus violates the totality-of-the-circumstances rule established by this Court. Pet. 11-16; see, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Sokolow*, 490 U.S. 1 (1989); *Ornelas* v. *United States*, 517 U.S. 690 (1996). The Ninth Circuit's departure from the totality-of-the-circumstances approach also has put it in conflict with other circuits that review Border Patrol stops like the stop in this case. Pet. 16-18. And, because the court of appeals failed to consider all the facts and failed to

defer to the "inferences drawn from those facts by [the] resident judge[] and local law enforcement officer[]," *Ornelas*, 517 U.S. at 699, it wrongly suppressed the evidence of drug trafficking in this case. Pet. 18-20.

1. Respondent makes no effort to defend categorical exclusion of facts from the reasonable-suspicion calculus. Rather, respondent argues that "[t]he opinion [in this case] does not hold that agents cannot consider the totality of the circumstances," and that the court of appeals merely "ruled that some of the factors [relied upon by Agent Stoddard] had no weight, *under the circumstances of this case*." Br. in Opp. 18; see also *id.* at 36. Respondent is incorrect. The court of appeals forthrightly stated its intent "to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." Pet. App. 12a. Consistent with that intent, the court eliminated seven different facts observed by Agent Stoddard from the reasonable-suspicion calculus "as a matter of law" (*id.* at 14a), without limiting its exclusions to this one case.

The court of appeals, for instance, stated without qualification that "slowing down after spotting a law enforcement vehicle is * * * in no way indicative of criminal activity" and may not be considered. Pet. App. 12a. Similarly, when holding that a "vehicle [cannot] be stopped because children who were passengers in the car" waved at a law enforcement officer (*id.* at 14a), the court never addressed the distinctive facts of this case, in which the district court found that "the methodical way, mechanical way, abnormal way that the children waved * * * without even turning around to look at the agent * * * would certainly lead a reasonable officer to wonder why are they doing this and would certainly lend some weight to a reason for stopping" the

vehicle (*id.* at 25a). The court of appeals also flatly stated, without focusing on the facts of this case, that "one's place of residence is simply not relevant to a determination of reasonable suspicion." *Id.* at 15a.

A very recent decision of the court of appeals makes clear that it does not share respondent's narrow view of the holding in this case. In *United States* v. *Sigmond-Ballesteros*, No. 00-50408, 2001 WL 396562 (9th Cir. Apr. 20, 2001), the court cited the decision below for the proposition "that only 'certain factors may be considered by law enforcement officers in making stops'" of traffic near the border. *Id.* at *2 (quoting Pet. App. 12a). The holding in this case thus transcends particular facts.

As respondent acknowledges, "[a]gents in the field may, and should, consider everything." Br. in Opp. 18. A fact observed by an officer is relevant to reasonable-suspicion analysis if it suggests unlawful activity when viewed "in combination" with the officer's other observations. *Id.* at 19; see, *e.g.*, *Sokolow*, 490 U.S. at 7-10; *Cortez*, 449 U.S. at 417-422. The court of appeals' approach, by contrast, requires a court to assess the constitutional significance of particular facts in isolation from "the whole picture" seen by the officer. *Sokolow*, 490 U.S. at 8 (quoting *Cortez*, 449 U.S. at 417). That approach prevents consideration of the officer's action in the context of *all* the facts known to the officer, as this Court's cases require. See *id.* at 7-10; *Cortez*, 449 U.S. at 417-418.

Respondent argues that "[t]he totality-of-the-circumstances test does not obligate courts to attribute weight to a factor that has no probative value." Br. in Opp. 19. That argument misses the point. Reasonable-suspicion analysis under the Fourth Amendment requires appellate courts to draw conclusions from the "mosaic" of

facts known to the law enforcement officer, giving due weight to the inferences of the officer and the local trial court. *Ornelas*, 517 U.S. at 696, 698-700. Courts need not consider whether a particular piece of the mosaic has "weight" *standing alone*, because none of the pieces of the mosaic should be assessed apart from the others. It is "the whole picture" that matters, *Sokolow*, 490 U.S. at 8, which is why conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless support reasonable suspicion or probable cause when viewed in context, *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000).

2. Respondent does not directly challenge our showing (Pet. 16-18) that the circuits are divided on whether particular factors that the court of appeals deemed irrelevant as a matter of law ever can contribute to reasonable suspicion. In fact, respondent notes that the Fifth and Ninth Circuits together "address a lion's share of the roving-patrol-stop cases" (Br. in Opp. 32), which underscores the importance of resolving the conflicts between those two circuits that the petition identifies.

Respondent does imply that there is no conflict with the Fifth Circuit with respect to the relevance of deceleration, invoking the Fifth Circuit's statements that it is common for a driver to slow down after seeing a marked patrol car. Br. in Opp. 24-25 (citing *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992), and *United States* v. *Samaguey*, 180 F.3d 195, 197-198 (5th Cir. 1999)). Those statements, however, do not suggest agreement with the Ninth Circuit's rule that considering deceleration in reasonable-suspicion analysis "is squarely prohibited." Pet. App. 12a. To the contrary, the Fifth Circuit deems sudden deceleration upon seeing a patrol car potentially relevant to the reasonable-suspicion inquiry. See Pet. 16 & n.5 (citing cases).

3. Respondent implicitly confirms the importance of this case. He recognizes that the decision "provides explicit guidance to those involved in roving-patrol stops," and suggests that it is a "landmark decision[]." Br. in Opp. 33, 34. Although respondent also says that "[t]he Ninth Circuit has conducted factor-by-factor [reasonable-suspicion] analysis in numerous cases" (*id.* at 20), this hardly counsels against granting certiorari. In this case, the court of appeals expressly sought to provide clearer guidance than existed before, see Pet. App. 12a, and its erroneous guidance cannot be dismissed as an aberration in the Ninth Circuit's cases, see Pet. 21-22 n.9.*

Respondent emphasizes (Br. in Opp. 33) that this case—even if it is limited to the border context—will affect a large number of law enforcement officers. That fact also suggests the importance of correcting the

---

* Respondent suggests that other courts of appeals exclude factors from the reasonable-suspicion inquiry in a manner akin to the Ninth Circuit's approach. Br. in Opp. 21-23. That suggestion is misplaced. Although courts routinely and properly identify and separately *articulate* the individual factors that are the ingredients of reasonable suspicion, see, *e.g.*, *Sokolow*, 490 U.S. at 8-9 (listing factors that "together * * * amount to reasonable suspicion"), the other courts of appeals do not routinely do what the Ninth Circuit did here, *i.e.*, isolate, weigh, and discard individual factors without considering them in relation to the total mix of information. The lower courts generally grasp the distinction between separate articulation and separate weighing. See, *e.g.*, *United States* v. *Edmonds*, 240 F.3d 55, 59-63 (D.C. Cir. 2001) (noting that the D.C. Circuit "does not separately scrutinize each factor relied upon by the officer conducting the search," yet discussing individual factors in the course of determining whether "the combination of several factors" gave rise to reasonable suspicion).

error below, particularly given the degree to which the decision, if allowed to stand, would compromise and confuse the work of Border Patrol agents. See Pet. 20-23. This Court recently noted that "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater* v. *City of Lago Vista*, No. 99-1408 (Apr. 24, 2001), slip op. 26. Excluding particular factors from reasonable-suspicion analysis requires officers to attempt to ignore what they know to be true and believe to be relevant based on their training and experience. See *United States* v. *Edmonds*, 240 F.3d 55, 59 (D.C. Cir. 2001) ("An officer on the beat does not encounter discrete, hermetically sealed facts."). Even if such walling-off is possible "in the heat of[] the moment," the Ninth Circuit's rule surely magnifies the difficulty of applying the Fourth Amendment, and increases the likelihood of error. See Pet. 21-22.

4. Respondent maintains (Br. in Opp. 24-31) that the result reached by the court of appeals—suppression of approximately 125 pounds of marijuana—was correct. Respondent essentially repeats the reasoning of the court of appeals. As the petition explains, however, the court of appeals disregarded key facts found by the district court, as well as inferences reasonably drawn by the officer on the scene. See Pet. 18-20; see *Ornelas*, 517 U.S. at 699 ("[A] reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."). Together, those facts and inferences

established reasonable suspicion. See *Sokolow*, 490 U.S. at 7 (the level of suspicion needed for reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence," and also less than the probable cause standard of "a fair probability that contraband or evidence of a crime will be found") (internal quotation marks omitted).

Respondent repeatedly suggests (Br. in Opp. 3, 4, 25, 27) that his route over back roads was a common way to reach various recreation areas. But, consistent with Agent Stoddard's testimony, the district court found that respondent was neither heading toward any nearby recreation area when he was stopped, nor taking a logical route to recreation areas located farther north. Pet. App. 22a. Furthermore, while respondent disputes (Br. in Opp. 4) whether the passage of one vehicle approximately every two hours makes Leslie Canyon Road "seldom-used," the district court concluded that the portion used by respondent "certainly isn't a heavily traveled road by any stretch of the imagination." Pet. App. 23a.

Respondent's insistence that the Border Patrol's shift change did not present a seeming opportunity to run drugs or aliens around the I-191 checkpoint (Br. in Opp. 29) is flatly inconsistent with the district court's determination that the shift change left the area open to smuggling. Pet. App. 23a; see also 12/7/98 Tr. 11, 31 (Agent Stoddard's testimony that the 3 p.m. shift change "leaves the area wide open" starting at approximately 2:15 or 2:30 p.m., and that "the time of day they seem to do the most smuggling is when the agents are en route back to the checkpoint.").

Respondent also suggests (Br. in Opp. 5) that Agent Stoddard "could not have 'known'" that respondent was taking a route that would avoid the I-191 Border Patrol

checkpoint. See also *id.* at 31 (arguing that "there was no clear checkpoint evasion"). While Stoddard did not, of course, have certain knowledge of respondent's subjective intent, he could readily deduce from respondent's route that it would achieve the effect of circumventing the checkpoint, and he knew that respondent's route is notoriously used for that purpose. Respondent's Appendix A shows respondent's northbound journey over "poorly traveled road[s]" (Pet. App. 22a) parallel to the interstate highway, followed by his turn onto Kuykendall Cutoff Road (between points (3) and (4) on the map) rather than proceeding straight on the road toward the Border Patrol checkpoint (point (1) on the map). See Br. in Opp. App. A. Agent Stoddard testified without contradiction that "this is a notorious route of travel that the aliens and narcotics smugglers have been using to circumvent the checkpoint" (12/7/98 Tr. 15), and the district court noted in its decision that "this is a road used to circumvent the checkpoint" (Pet. App. 23a). Thus, while Agent Stoddard could not have been certain that respondent had planned his route in order to evade the I-191 checkpoint, respondent's route strongly supported Stoddard's decision to "detain the individuals to resolve the ambiguity" created by respondent's trip. *Wardlow*, 528 U.S. at 125.

Respondent dismisses the children's seemingly coached waving by suggesting that abnormal behavior is irrelevant to reasonable-suspicion analysis unless it is "on the part of the person suspected of engaging in criminal activity." Br. in Opp. 26. Respondent's proposed rule is plainly incorrect. For example, if police observe the occupants of two cars carry out an apparent drug transaction, and one car speeds off when the police come into view, the high-speed flight of the first car would contribute to reasonable suspicion of

(and potentially probable cause to arrest) the occupants of the second car. Respondent's suggested rule is, in any event, inapplicable, because Agent Stoddard suspected that the adults in respondent's minivan were instructing the children to engage in their unusual waving, and he considered that coaching *by the adults* to be suspicious. See 12/7/98 Tr. 20, 44.

Finally, respondent makes much of Agent Stoddard's failure to testify in so many words that respondent's minivan—which was carrying two adults and three children in addition to cargo—was "heavily laden." Br. in Opp. 6, 27; see Pet. App. 6a. Stoddard testified that the children's posture indicated that "[t]here was some type of cargo on the floor in their foot area." 12/7/98 Tr. 19. Respondent thus is suggesting a line of constitutional dimension between an officer's observation that a vehicle "appear[s] to be heavily loaded" (which supports reasonable suspicion under *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975)) and an officer's observation that a vehicle appears to be carrying cargo out of view. Such a distinction would be unworkable for law enforcement officers in the field, and inconsistent with this Court's "commonsense, nontechnical" approach to reasonable-suspicion analysis. *Ornelas*, 517 U.S. at 695.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

MAY 2001

(8)

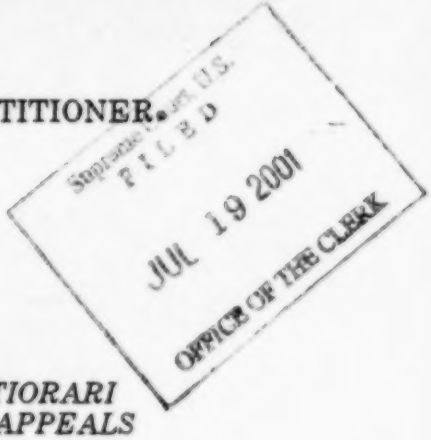
No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

RALPH ARVIZU



ON ~~PETITION FOR A WRIT~~ OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APR. 2, 2001
CERTIORARI GRANTED: JUNE 4, 2001

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA (TUCSON)

No. 98-CR-157-ALL

UNITED STATES OF AMERICA, ET AL., PLAINTIFF

v.

ARVIZU, DEFENDANT

[Filed: Feb. 11, 1998]

DOCKET ENTRIES

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/19/98	--	DEFENDANT Ralph R Arvizu arrested. Ralph R. Arvizu (1) count(s) cmp [4:98-m -50] (mrp) [Entry date 01/26/98]
1/20/98	1	COMPLAINT filed as to Ralph R Arvizu [4:98-m -50] (mrp) [Entry date 01/26/98]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
		* * * * *
1/21/98	5	ORDER by Mag Judge Raymond T. Terlizzi setting conditions of release; PAB bond set for Ralph R Arvizu in the amount of $ 7500 [4:98-m -50] (mrp) [Entry date 01/26/98]
		* * * * *
2/11/98	9	INDICTMENT by USA attorney Christina Marie Cabanillas. Counts filed against Ralph R Arvizu (1) count(s) 1; Arraignment set for 11:00 2/19/98 for Ralph R Arvizu before Mag Judge James C. Carruth (br) [Entry date 02/11/98]
2/17/98	10	WAIVER of Personal Appearance at Arraignment and Entry of Plea of Not Guilty by Ralph R Arvizu (br) [Entry date 02/18/98]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
4/17/98	17	MOTION to suppress evidence based on lack of reasonable suspicion to stop [17-1] by Ralph R Arvizu (br) [Entry date 04/20/98]
		* * * * *
12/7/98	32	(FILED: 12/8/98) MINUTES: before Judge Frank R. Zapata Ct Rptr: D. Davenport denying motion to suppress evidence based on lack of reasonable suspicion to stop [17-1], trial date of 12/29/98 is affirmed [cc: frz usa cnsl psa [32-1] (br) [Entry date 12/09/98]
		* * * * *
1/13/99	38	(FILED: 1/13/99) MINUTES: before Mag Judge Glenda E. Edmonds Ralph R Arvizu (1) enters a plea of guilty to Indictment ; sentencing set for 1:30 4/2/99 for Ralph R Arvizu [cc: usa po psa cnsl frz [38-3] (br) [Entry date 01/19/99]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/13/99	39	PLEA agreement filed as to Ralph R Arvizu (br) [Entry date 01/19/99]
1/20/99	40	ORDER by Mag Judge Glenda E. Edmonds on 1/13/99 of the Findings and Recommendation upon a plea of guilty as to Ralph R Arvizu and District Court Judge Zapata's acceptance of plea of guilty. (br) [Entry date 01/25/99]
		* * * * *
4/22/99	47	(FILED: 4/28/99) MINUTES: before Judge Warren W. Eginton Ct Rptr: B. Harper ; sentencing held re dft Arvizu [cc: USA PO PT Cnsl FRZ] [47-2] (bsw) [Entry date 04/28/99]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
4/22/99	50	JUDGMENT and Commitment issued as to Ralph R Arvizu sentencing for Ralph R Arvizu (1) count(s) 1. 10 mos imprisonment (5 mos in a community corrections center & 5 mos as home confinement w/electronic monitoring); 36 mos sup rel; fine waived; credit for time served; voluntary surrender program; $100 s/a; Case closed; ordered by Judge Warren W. Eginton (bsw) [Entry date 04/28/99]
4/28/99	51	NOTICE OF APPEAL by Ralph R Arvizu from District Court, re sentencing and judgement, and order of 12/7/98 denying motion to suppress evidence (cc: 9CCA/All Counsel) (br) [Entry date 04/29/99]
		* * * * *

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
1/2/01	59	(FILED: 1/3/01) MINUTES: before Judge Frank R. Zapata Ct Rptr: D. Davenport status hearing re mandate w/9CCA, the mandate having been returned from 9th Circuit Court of Appeals reversing and remanding court's ruling on motion to suppress; trial set for 9:00 2/20/01 for Ralph Arvizu; status hrg held [cc: usa po psa cnsl [59-2] (br) [Entry date 01/03/01]
		* * * * *
2/20/01	61	(FILED: 2/21/01) MINUTES: before Judge Frank R. Zapata denying motion for dismissal pursuant to the speedy trial [0-0], denying motion dismissing defendant [0-0], granting motion to continue trial date to permit the filing of petition for certiorari [60-1]; trial set for 9:00 4/3/01 for Ralph R Arvizu, excludable delay XT started 2/20/01 terminating 4/3/01 [cc: usa po psa cnsl [61-3] (br) [Entry date 02/21/01]

DATE	DOCKET NUMBER	DOCKET PROCEEDINGS
3/20/01	62	MOTION to continue trial date until US Supreme Court issues final decision [62-1] by USA as to Ralph R Arvizu (br) [Entry date 03/21/01]
3/20/01	63	ORDER by Judge Frank R. Zapata granting motion to continue trial date until US Supreme Court issues final decision as to Ralph Arvizu [62-1] (br) [Entry date 03/21/01]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-10229

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RALPH ARVIZU, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
5/5/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 4/29/99; setting schedule as follows: transcript shall be ordered by 5/19/99 for Ralph Arvizu; transcript shall be filed by 6/21/99; appellants' briefs, excerpts due by 8/2/99 for Ralph Arvizu; appellees' brief due 9/2/99 for USA; appellants' reply brief due by 9/16/99 for Ralph Arvizu. (RT required: y) (Sentence imp 10 mos) [99-10229] (kc) [99-10229]
	* * * * *
7/7/00	FILED OPINION: REVERSED AND REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Henry A. Politz; Stephen R.

DATE	PROCEEDINGS
	REINHARDT, author; Michael D. HAWKINS) FILED AND ENTERED JUDGMENT. [99-10229] (rc) [99-10229]
	* * * * *
8/21/00	[3975970] Filed original and 50 copies aple's petition for rehearing with suggestion for rehearing en banc of 18-pgs; serve[d o]n 8/19/00. (PANEL AND ALL ACTIVE JUDGES) [99-10229] (rc) [99-10229]
	* * * * *
9/14/00	Filed order (Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) aplt is ordered to file a response to the petition for rehearing with petition for rehearing en banc within twenty-one (21) days from the date of this order. [99-10229] (rc) [99-10229]
	* * * * *
12/1/00	Filed order and amended opinion (Judges Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) (Orig. opinion REVERSED AND REMANDED. The petition for rehearing and petitio[n] for rehearing en banc are DENIED.id: [3945888-1]) [99-10229] (tm) [99-10229]

DATE	PROCEEDINGS
12/12/00	MANDATE ISSUED [99-10229] (tm) [99-10229]
12/29/00	Filed USA motion to recall and stay the mandate pending petition for writ of cert. (PANEL) [99-10229] served on 12/28/00 [4085702] (wp) [99-10229]
1/9/01	Filed Appellant's response to motion to recall and stay mandate pending petition for writ of cert. served on 1/5/01 (PANEL) [99-10229] (wp) [99-10229]
1/11/01	Filed Order (Henry A. Politz, Stephen R. REINHARDT, Michael D. HAWKINS) The Motion to Recall and Stay Mandate Pending for Writ of Certiorari is DENIED. [99-10229] (af) [99-10229]

* * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-98-157-01-TUC-FRZ

UNITED STATES OF AMERICA

v.

RALPH R. ARVIZU

* * * * *

[Filed: Apr. 28, 1999]

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT ENTERED A PLEA OF:

XX guilty __ nolo contendre: as to the Indictment

THERE WAS A:

XX finding __ verdict: of guilty as to the Indictment

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: violating Title 21 United States Code Section 841(a)(1) and (b)(1)(C), Possession with Intent to Distribute Marijuana, a Class C felony, as charged in the Indictment filed herein.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the Bureau of Prisons for imprisonment for a period of **TEN (10) MONTHS, FIVE (5) MONTHS TO BE SERVED IN A COMMUNITY CORRECTIONS CENTER, FIVE (5) MONTHS TO BE SERVED AS HOME CONFINEMENT WITH ELECTRONIC MONITORING.**

In addition, the defendant shall serve a **THIRTY-SIX (36) MONTH** term of supervised release to commence upon the defendant's release from confinement and as provided by the law. Within 72 hours of release from confinement, the defendant shall report in person to the U.S. Probation Office in the district to which he is released.

In addition to the general terms of supervised release, the following conditions are imposed: **1.** The defendant shall participate as instructed by the probation officer in a program of substance abuse treatment which may include testing for substance abuse. The defendant shall contribute to the cost of treatment in an amount to be determined by the probation officer. **2.** The defendant shall submit to search of person, property, vehicles, business, and residence to be conducted in a reasonable manner and at a reasonable time by, or at the direction of, the probation officer.

The Court finds the defendant does not have the ability to pay and orders the fine **WAIVED**.

IT IS FURTHER ORDERED the defendant is to receive credit for **TIME SERVED**.

The defendant is granted leave to voluntarily surrender under the "Voluntary Surrender Program." Defendant is directed to surrender to the designated institution as directed by the Bureau of Prisons.

* * * * *

IT IS FURTHER ORDERED that the defendant shall pay an assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) the Indictment as follows:

TOTAL ASSESSMENT $100.00
SPECIAL ASSESSMENT TO BE PAID IMMEDIATELY OR AS DIRECTED BY THE COURT

* * * * *

April 22, 1999
Date of Imposition of Sentence

/s/ [Illegible]
Signature of Judicial Officer

Warren W. Eginton, Senior U.S. District Judge
Name and Title of Judicial Officer

April 26, 1999
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Tucson-Globe Division) **CRIMINAL MINUTES**

98 / 157/ 1 Date: December 7, 1998
Yr Case No. Dft#

HONORABLE FRANK R. ZAPATA

USA v. ARVIZU RALPH
Last Name First Name Middle Name

DEFENDANT: XX Present XX Released
__ Custody __ Writ

Deputy
Clerk: Virginia Abeyta Crt Rptr: Dianne Davenport

U. S. Atty: Chris Cabanillas Dft Atty: Victoria Brambl
__pres__ appt. ___ret'd

Intrptr:_____

__ Dft not appearing, on mot of US Atty, order bond revoked/forfeited and B/W issued, dft to be held without bail

PROCEEDINGS: XX Open Court __Chambers __Other

HEARING PENDING MOTIONS: Counsel make statements to the Court. Witnesses Clinton Stoddard, Victor Chacon, Ralph Arvizu, Julie Reyes, sworn and examined. Exhibits marked and admitted. Returned to counsel.

Pursuant to Findings on the record,

ORDERED Motion to Suppress Evidence is DENIED.

Trial date of December 29, 1998 is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
Tucson, Arizona

CR 98-157-TUC-FRZ

UNITED STATES OF AMERICA, PLAINTIFF

v.

RALPH ARVIZU, DEFENDANT

Tucson, Arizona
December 7, 1998

MOTIONS HEARING

BEFORE: HONORABLE FRANK R. ZAPATA
UNITED STATES DISTRICT COURT JUDGE
55 E. BROADWAY
TUCSON, ARIZONA 85701

A P P E A R A N C E S

FOR THE GOVERNMENT: MS. CHRIS CABANILLAS, Assistant United States Attorney.

FOR THE DEFENDANT: MS. VICTORIA BRAMBL, Assistant Federal Public Defender.

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P R O C E E D I N G S

(Call to order of court, 9:50 a.m.)

THE CLERK: In criminal matter 98-157, the United States of America versus Ralph Arvizu, on for hearing pending motions.

MS. CABANILLAS: Good morning. Chris Cabanillas for the United States.

THE COURT: Good morning, Ms. Cabanillas.

MS. BRAMBL: Victoria Brambl for Mr. Arvizu.

THE COURT: Good morning, Ms. Brambl.

This is the time set for the motions hearing in this case.

The government ready to proceed?

MS. CABANILLAS: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MS. BRAMBL: Yes, Your Honor.

MS. CABANILLAS: The government would call Agent Clinton Stoddard, United States Border Patrol.

CLINTON STODDARD, GOVERNMENT WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Clinton Eric Stoddard, S-t-o-d-d-a-r-d.

[4]

DIRECT EXAMINATION

BY MS. CABANILLAS:

Q. Agent Stoddard, where do you work?

A. I work for the United States Border Patrol.

Q. And how long have you worked for the United States Border Patrol?

A. Over two and a half years.

Q. And where are you primarily assigned at this point?

A. The Douglas, Arizona station.

Q. How long have you worked in the Douglas area?

A. For over two years.

Q. And what are your duties as a border patrol agent in the Douglas area?

A. Our primary duties are immigration laws and we also have secondary duties of custom, tariff, and Title 21 duties.

Q. As part of your duties, are you involved in the interdiction of illegal aliens and narcotics?

A. That is correct.

Q. Have you been trained at all about the particular patterns and modes of certain illegal alien smugglers or drug dealers in the Douglas area?

A. Yes.

Q. As part of your duties as a border patrol agent in that area, do you stop vehicles that could possibly contain illegal aliens or drugs?

A. Yes.

Q. And have you received any training about how to detect whether or not certain vehicles that are traveling on the road may contain illegal aliens or drugs.

A. Yes.

Q. And what exactly have you learned or what kind of training have you either received or given?

A. It starts back at the academy. You go through approximately five months of training and part of that training is how to detect when there are people—through their behavior and actions when they are transporting illegal aliens or illegal narcotics.

And then once you arrive to the station, for the first several months you are put with a journeyman agent which is a more senior agent. They take you through and show you the local routine for the local smugglers, routes of travel, and show the ropes and what happens in that particular area. I was shown the Douglas area.

Once you have enough experience, then you go on and you train others on the experiences and the things that you have learned.

Q. Have you given training then?

A. Yes.

Q. Have you received that level then?

A. Yes.

[6]

Q. How often would you say you have trained other agents in this area?

A. When we are working in the field, on a daily basis often we are placed with training agents and we show them basically the whole area of operations.

Q. What are border patrol checkpoints?

A. Border patrol checkpoint is where we stop all the traffic that goes through that area and we are attempting to stop the undocumented illegal aliens from going further north into the United States.

Q. Have you worked yourself at a border patrol checkpoint?

A. Yes.

Q. Have you worked at checkpoints not only near the border but away from the border?

A. Yes.

Q. And what are roving patrols?

A. Roving patrol is basically when you are in a marked unit and you are looking for traffic driving by that you suspect to be involved in illegal activity such as smuggling.

Q. Have you ever been on roving patrol?

A. Several times.

Q. When you are on roving patrol is the fact that a checkpoint may be operational that day maybe significant to you as you are doing your duties?

A. Yes.

[7]

Q. Why?

A. When a checkpoint is operational the illegal activity that is conducted throughout the day usually tries to evade the checkpoint one way or another, tries to circumvent it, either through walking around the checkpoint or driving around the checkpoint. So when you are roving patrol, you are looking for both of that type of activity.

Q. When you say "driving around the checkpoint," what do you mean? Where do the vehicles usually go?

A. Usually take the back roads.

Q. When you say "back roads," what do you mean?

A. Unpaved roads that don't run right through the checkpoint where they can't be interviewed and questioned by border patrol agents.

Q. When you are on roving patrol then, what are your duties exactly?

A. Our duties on roving patrol are to try to detect illegal activity outside the checkpoint, try to detect suspected smugglers that circumvent the checkpoint.

Q. You stated you have been on roving patrol before several times; I believe is what you said. Can you give us an estimation how many times you have stopped vehicles that have contained illegal aliens or drugs?

A. Be [*sic*] my estimation over 50.

Q. Were you working on January 19, 1998 at approximately [8] 2:15 p.m.?

A. Yes, I was.

Q. Where were you?

A. I was at the border patrol checkpoint located on Highway 191.

MS. CABANILLAS: Your Honor, at this point I will use some exhibits. Can I set up the exhibit?

THE COURT: Yes, you may.

MS. CABANILLAS: May I approach with a copy of the exhibit so Your Honor can see it more clearly than from a distance?

THE COURT: Yes, you may.

BY MS. CABANILLAS:

Q. I'm showing you what has been marked as Exhibit 41. Do you recognize that exhibit?

A. Yes, I do.

Q. What is that?

A. That is a general map of the area from Douglas up to the 191 checkpoint and some of the area that is east of it.

Q. I'm showing you what has been marked Exhibit 40. Do you recognize that?

A. Yes. That is the same map only a smaller version.

Q. Is that an 8 1/2 by 11 version of Exhibit 41?

A. That is correct.

Q. You stated that you were—I believe you stated where [9] you were working on January 19 at approximately 2:15. Where was that?

A. At the checkpoint at 191.

Q. The checkpoint at I-91- --

MS. CABANILLAS: Do we have a pointer by chance perhaps?

BY MS. CABANILLAS:

Q. Using the pointer can you give us an indication of where you were working on I-191?

A. The 191 checkpoint is set up at the intersection of 191 and Rucker Canyon Road, right there.

Q. I-191, can you give us, by the use of your pointer, an indication of where 191 runs north to south?

A. Yes. 191 runs north along this line right here.

Q. Does it go along that diagonal line or along the straight up-and-down line? Feel free to take a look at the exhibit.

A. It runs along the diagonal line right here.

Q. When you say you were working the checkpoint at I-91 and—what was the cross street?

A. I-91 at Rucker Canyon.

Q. Do you think you can use a pen and write a number 1 and put a circle around it on Exhibits 40 and 41 to indicate where the checkpoint was?

A. Sure. Number 1?

Q. Number 1 with a circle around it where your checkpoint [10] was.

Now, how far north of the border is that checkpoint where you put the number 1?

A. It's approximately 30 miles or so.

Q. 30 miles. And approximately 2:15 p.m. did anything happen that drew your attention that day?

A. Yes. Via Douglas radio it was reported through an intrusion device indicating that a northbound vehicle had gone off.

Q. When you say "intrusion device," what do you mean?

A. It is a sensor basically stating that there is vehicular activity on a particular route of travel.

Q. Using the pointer again on Exhibit—what is the large exhibit, 41?

A. 41.

Q. Using the pointer on Exhibit 41, can you indicate for the court—when you state that the sensor activity indicated a northbound route of travel, without giving away obviously any confidential information, give us the general area of where the sensor activity was indicated.

A. Yes. It's going to be between Hunt Canyon and Rucker Canyon on Leslie Canyon Road which runs north along here.

Q. When you say right "along here," are you indicating north to south route of Leslie Canyon?

A. That is correct.

[11]

Q. And is Leslie Canyon Road indicated in writing on Exhibit 41 and Exhibit 40 down below?

A. Yes.

Q. So Leslie Canyon runs how far north and then where does it end?

A. It runs as far north as when it meets Rucker Canyon and then it ends.

Q. That is where it ends north. Where does it end south?

A. South ends at Highway 80.

Q. Is that in the Douglas area?

A. That's correct.

Q. So would that be a north-to-south route—or north-to-south route for somebody leaving from Douglas?

A. Yes.

Q. When that sensor activity went off, was that significant to you?

A. Yes, it was.

Q. Why is that?

A. Part of the significance was the time of day. We have a shift change at about that time. Agents begin heading back to the checkpoint which leaves the area wide open and alien smugglers do extensive scouting and that is the time of day they seem to do the most smuggling is when the agents are en route back to the checkpoint.

Q. As far as this road is concerned—and you stated it was [12] Leslie Canyon heading north—is there any significance about that route particularly?

A. That route is very rarely traveled. It's traveled mostly by ranchers and forest service personnel. Border patrol agents patrol occasionally. So it is not—it is a very desolate area.

Q. What did that tell you in relation to the fact that the checkpoint was operational that day?

A. That indicated that there was the probability of a vehicle circumventing the checkpoint using that route of travel.

Q. When you hear the sensor activity then, what did you do—actually, before you did anything, did anybody tell you anything with relation to that sensor activity in that particular area?

A. Yes. A work mate of mine, another border patrol agent that was working the checkpoint with me, had reminded me of an apprehension under similar circumstances that he had. That same sensor had gone off some time before, several weeks, maybe a month before that. He had apprehended a van, a minivan, using the same route of travel, and he witnessed them throwing bundles of marijuana out the door.

Q. Did you say he apprehended that van, the people in that van?

A. Yeah. He continued north and apprehended the van.

[13]

Q. When you state where this area was, can you give us an explanation or a brief description of this area where the sensor activity went off?

A. This particular area here?

Q. What kind of an area is it?

A. Maintained dirt road. As I said before, it is very desolate, very rarely traveled. You can sit on that road for hours and not see a vehicle go by.

Q. After you received this information from the other agent, what did you do then?

A. I responded in that direction to be able to check out anything that was going on and any activity in case that vehicle continued in our area of responsibility which would have turned west on Rucker Canyon then there is another sensor that would have indicated that.

Q. If somebody is heading—actually, strike that. The sensor activity indicated the direction the vehicle was taking. Is that what you said?

A. Yes.

Q. What direction was that?

A. Northbound.

Q. So you headed what direction on Rucker to try to intercept it?

A. I began driving eastbound on Rucker Canyon.

Q. With your pointer can you indicate where Rucker starts [14] and ends east and westbound?

A. I started right here.

Q. Which is at intersection?

A. Intersection 191 and Rucker. I drove eastbound.

Q. Then Rucker Canyon—if you just use your pointer to show us where Rucker Canyon leads all the way across.

A. Rucker Canyon leads to Kuykendall and then it continues past Mountain Queen and up to where it intersects with Leslie Canyon and continues on eastbound to Highway 80.

Q. When you say "eastbound," is it going into a particular area? I see some blocks over there. What is that?

A. This is a very heavy forest area.

Q. Is that a national forest?

A. Yes.

Q. So when you started traveling then eastbound on Rucker, what happened?

A. As I was traveling eastbound on Rucker, when I got up in this area, another report of sensor activity came over the radio which indicated that the vehicle began heading westbound on Rucker from Leslie Canyon. It started westbound on Rucker Canyon.

Q. So correct me here. The vehicle then, rather than taking a right turn and heading east into the forest, it turned, is that what that would indicate to you, that it turned to head east towards—

[15]

A. Yes.

Q. Was that significant?

A. That was very significant because this is a notorious route of travel that the aliens and narcotics smugglers have been using to circumvent the checkpoint.

Q. When you say "circumvent the checkpoint," what route would—someone who is trying to circumvent that checkpoint you had up that day, what route would that person take to do so successfully?

A. Most common route of travel is to continue westbound on Rucker and go northbound on Kuykendall Cutoff to Highway 191.

Q. Would they have been able to access Tucson or Phoenix?

A. Yes. From that point on there is very limited patrol, and once they get north of the checkpoint, it is very difficult for us to apprehend them.

Q. So when you heard—or you received information that the second sensor went off, where were you?

A. I was continuing eastbound on Rucker Canyon when the second sensor activity was reported.

Q. Did you indicate whether Rucker Road was paved or unpaved?

A. Rucker Road is unpaved.

Q. Is that a dirt road?

A. That is a dirt road. All the roads in this area are unpaved.
[16]

Q. Now, the other road, Kuykendall Road, what kind of a road is that?

A. Kuykendall is also an unpaved road.

Q. When you started heading east then on Rucker, did you happen to see another vehicle?

A. Yes. Once I passed Kuykendall, I continued east. I saw a dust trail and a vehicle approaching my location.

Q. Before we get to that point, when you indicate that the entrance from the eastbound goes into the forest on eastbound Rucker, are there any picnic grounds and stuff in that area of the forest?

A. Yes. East of the intersection of Rucker and Leslie I believe there is picnic grounds up in that area.

Q. When you encountered the vehicle then, how far away were you when you first saw it?

A. When I first saw the vehicle, I first saw the dust trail probably a half mile or so.

Q. Had you encountered any other vehicles before you saw this particular vehicle?

A. No. That was the only vehicle.

Q. Were you alone in your vehicle, by the way?

A. Yes.

Q. From the timing of when the sensors were tripped, the first and second one, when you saw that vehicle, did you believe this was the vehicle that had tripped the sensors?

[17]

A. Yes. The timing was right about.

Q. When you saw that vehicle and you became visible to the other vehicle, did you see the vehicle do anything?

A. Yeah. I pulled off to the side of the road as I saw the dust trail so I could see it approach. I saw the vehicle. It appeared to slow down dramatically.

Q. When you say "dramatically," what do you mean?

A. Probably reduced its speed to about half or so.

Q. You stated that you pulled off. What do you mean that you did?

A. I pulled off to the side of the road so I was stopped so I could obtain a good look when that vehicle drove by.

Q. Did you pull off along the shoulder?

A. Yeah, on the right side, a little area I pulled off.

Q. Can you put a 2 on that exhibit—on Exhibit 41 and 40 and put a circle around it where you pulled off?

A. I don't know the exact location on this. I will put it in an approximate location.

Q. That's fine.

Now, you say you pulled off. Were you facing the oncoming car then?

A. Yeah. I was facing the oncoming car slightly at a slant.

Q. And what did you see?

A. As the vehicle approached me, I saw what appeared to be five occupants. One male driver and the driver was rigid. He was kind of stiff. [18] His—both hands were on the steering wheel, an odd posture, as if he was nervous once he saw me.

Q. What kind of car was this or vehicle?

A. It was a Toyota minivan.

Q. Is the fact that it was a minivan significant to you?

A. Yes, very significant.

Q. Why is that?

A. It's a very commonly used vehicle to smuggle both illegal aliens and narcotics. I've had experience with both and so have other agents. In fact, the agent that relayed his story to me, they had also used a minivan in that same area.

Q. When you say in your experience, then have you personally been involved in the seizures of drugs and aliens from minivans?

A. Both drugs and aliens, correct.

Q. You say you saw five occupants, or a driver that was rigid. How did you describe the driver?

A. Very stiff, very rigid posture. Both hands were on the steering wheel. He appeared to be in a tight manner. He did not look in my direction, as if he was ignoring me, trying to pretend I wasn't there, or something to that effect. There was a passenger that

seemed fairly uptight as well. Then there was three children in the back.

Q. When you say "the back," I'm not familiar with minivans. How many seats are in a minivan?
[19]
A. If I recall there was two back seats.

Q. All right. Where were the children?

A. There was one child in the middle seat and then there was two children in the very back seat.

Q. Did you notice anything with relation to the two children in the back seat that caught your attention?

A. Yes, I did. The children in the back seat had an odd posture as well. Their knees were elevated kind of high as if their feet were propped up on something, but it didn't look like they were propped up on their own seat. It was in the regular well area but in a higher location. You could see the knees at the seat level.

Q. What did that indicate?

A. There was some type of cargo on the floor in their foot area, something they were propped up on.

Q. And what did you do then after you saw the car pass your location and made those observations?

A. At that point I wanted to get a closer look at it so I pulled off and I began to follow the vehicle.

Q. And when you're following the vehicle, it's heading which direction, if you can use the pointer on Exhibit 41?

A. The vehicle is continuing in a westbound direction on Rucker Canyon.

Q. Then that is leading towards the Kuykendall Road Cutoff then?
[20]
A. Correct.

Q. You are following it?

A. That is correct.

Q. Did the kids do anything when you were following the car that attracted your attention?

A. Yes. Shortly after I began following the vehicle, the kids began to wave to me. Looked like all three of the kids were waving. It wasn't in a normal pattern. It looked like they were instructed to do so. They kind of stuck their hands up and began waving to me like this.

Q. Were they looking at you?

A. No, they weren't looking at me.

Q. Did they continue to face forward then?

A. Correct.

Q. Were they waving at you or forward?

A. It looked like they were waving forward.

Q. How long did they continue this particular gesture?

A. They did it off and on for the entire time I was following them. Probably four minutes or maybe five minutes.

Q. Four or five minutes they are continuing this waving?

A. Yeah, off and on.

Q. What happened then after you saw this?

A. Well, the driver signified he was going to turn right using his signal, his right-turn signal. It looked like he signaled several hundred feet before Kuykendall Road to turn [21] right, which would be the last turnoff to circumvent the checkpoint successfully.

Then at one point his turn signal was clicked back off so I thought maybe he was going to go straight. Right as he approached the intersection, he put it back up and made an abrupt turn right.

Q. Turned north onto Kuykendall?

A. Went north on Kuykendall.

Q. The Kuykendall Road itself, is that different as far as terrain is concerned between the Rucker Canyon Road?

A. Rucker Canyon Road is maintained whereas Kuykendall is maintained occasionally, but I don't think it is maintained as often. There are a lot of washouts when it rains. The roads—it can be driven on by like a sedan or a van, but it is not normal traffic.

Q. Do you as border patrol agents take sedans or vans in that area?

A. No. It's against our regulation because the only thing we are allowed to take out there is a 4X4.

Q. 4X4?

A. 4X4 vehicle. That's correct.

Q. The fact that the van took the abrupt turn on Kuykendall Road, is that significant to you?

A. That is significant.

Q. Why?
[22]

A. Because of the type of vehicle, number one. It is not normal. I didn't recognize the vehicle. And we spend enough time out there where we kind of know what vehicles are normal out there, the normal traffic, which is ranchers and so forth. Thirdly, because that is the final route of travel to circumvent the checkpoint.

Q. And then after the vehicle made that abrupt turn right, did you follow it?

A. Yes, I did.

Q. Did you happen to run the registration or anything on this car?

A. Yes, I ran the registration check through the radio.

Q. What results did you get?

A. It came back to the 400 block of Douglas, Arizona.

Q. 400 block of Douglas?

A. Uh-huh.

Q. Any particular streets or roads?

A. 4th Street.

Q. What was that as far as—was that significant to you?

A. That is very significant.

Q. Why is that?

A. That area is the—it is one of the most notorious areas of smuggling in the Douglas area.

Q. What kind of smuggling?

A. Both alien and narcotic smuggling. We have several of [23] the locations on that street that are listed as lookouts where they stage aliens and narcotics before transporting them further north.

Q. How far north of the border is that particular street that you were talking about?

A. Four blocks.

Q. Four blocks north of the U.S.-Mexico border?

A. That's correct.

Q. And what did you do after that, after that registration came back?

A. After the registration came back, I decided to perform a vehicle stop on the vehicle.

Q. Can you put a 3 with a circle around it at the point that you did the stop of the vehicle on Exhibits 40 and 41?

A. Sure. Again, I will approximate because I don't know exactly on this map where the stop was.

Q. That's fine.

MS. CABANILLAS: Your Honor, I move to admit Exhibits 40 and 41 at this point.

THE COURT: Any objection?

MS. BRAMBL: No, Your Honor, but I would ask to approach so I can look.

THE COURT: Yes, you may.

Point out where the marks are again.

THE WITNESS: Sure.
[24]

MS. CABANILLAS: Were those admitted, Your Honor?

THE COURT: Yes, shall be admitted.

BY MS. CABANILLAS:

Q. After you stopped the vehicle, what did you do?

A. Once I stopped the vehicle, I approached from the driver's side.

Q. And did you happen to look inside the vehicle from the outside when you were walking by?

A. Yes. As I was walking by, I looked inside the vehicle where the children were sitting in the back and their legs were high, as it looked when they passed by. It looked as though they were propped up.

Q. Could you see what that something was from the outside?

A. I couldn't tell what it was. It appeared to be some type of cargo.

Q. Did you approach then the driver's side?

A. Yes. I approached from the rear of the vehicle. I approached the driver's side.

Q. Without telling us what you said, did you have a conversation with the driver of the car?

A. Yes.

Q. Did you eventually learn what the driver's name was?

A. Yes.

Q. What was that name?

A. Ralph Arvizu.

[25]

Q. Do you see that individual in the courtroom today?

A. Yes, I do.

Q. Can you please point him out for the court?

A. Sure. Sitting right there.

Q. When you say "right there," can you describe what he's wearing?

A. A striped shirt, glasses, black hair.

MS. CABANILLAS: May the record reflect identification, Your Honor?

THE COURT: It may.

BY MS. CABANILLAS:

Q. Now, did you—you said you spoke to the driver. Can you tell us what you said and what he said briefly?

A. Yes. As I approached the vehicle, he seemed kind of excited, which is one of the signs that we are taught to look for. He kind of stuck his head back out and looked at me and said, "Good afternoon, Officer. How are you doing?" in a real excited tone of voice.

Q. What does that indicate to you?

A. Indicates he's very nervous, that he may be doing something wrong. As I approached I identified myself as a United States Border Patrol agent. I asked him where he was coming from and heading to.

Q. What did he say to you?

A. He stated that he was coming from Douglas and he was [26] heading to a park. He kind of stumbled over the name. And he couldn't recall the name of the park he was going to.

Q. Did you ask him where he is from?

A. Yeah, I asked him where he was from. He said he was born and raised in Douglas, Arizona.

Q. So the fact he couldn't provide a name for the area where he was going, was that significant to you?

A. That was significant because—

Q. Why is that?

A. —in my own opinion, when I am heading to a certain park or location, I usually know exactly where I am going.
Q. Did he indicate that he didn't know the name, period?

A. That maybe he forgot the name is the impression I got.

Q. Now, did he indicate he was going to a park? Is that what you said?

A. Yes.

Q. Did he say the forest or the park? Do you remember?

A. I don't recall.

Q. Did you notice—first, what language were you speaking here?

A. He initiated the conversation in the English language. He spoke it perfectly unbroken so I continued the conversation in English.

Q. And did you notice anything with regard to his mannerisms that you found significant?
[27]
A. Yes. He seemed very nervous. He didn't know what to do with the hands. They were shaking. I looked at his forehead and he had some sweat on his

forehead which also indicates that he may be nervous. It wasn't very hot out.

Q. After you spoke to him then about where he was going, what else occurred? Did you say anything else to him?

A. Can I refer to my report?

Q. Sure.

A. Yeah. After we talked about where he was from and where he was going to, I asked him what his immigration status was. He stated, you know, real excited—and, actually, at this point he seemed like he was kind of telling the truth. It was the only time throughout the thing it didn't seem like he stuttered with the answer—he was a U.S. citizen and everybody in the van was a United States citizen.

Q. What happened after that?

A. I asked him if he had anybody that was hidden or any cargo that was hidden in the area that wasn't visible.

Q. What did he say?

A. He said no.

Q. Did you say anything after that?

A. I asked him if he would mind if I looked inside and searched the vehicle.

Q. Did you ask it the way that you just stated you did?

A. Yes.

[28]

Q. And what did he say?

A. He said, "Sure, no problem."

Q. At this time when you asked him for this consent, did you have your gun drawn at all?

A. No.

Q. Did you have him in handcuffs or anything?

A. No.

Q. What was his position and where was he?

A. He was sitting in the driver's seat. The vehicle was running and very simple.

Q. What did you do then when he told you you could look in the car?

A. I walked around to the passenger side and the window was open. I asked him if he'd mind if I open the back door. He stated, "Sure." I said, "Is it unlocked?" He said, "It is." At that point I opened the back door and slid it open. I saw there was one child in the rear seat right there, the middle seat. There was like an ice chest and a bag of chips. And then in the back seat there was two children and I looked back and I smelled what appeared to be an odor of marijuana.

Q. And what did you see?

A. I saw a black duffel bag.

Q. Were these the same two children that you stated before had had their knees at that angle that made you think there was something underneath their feet?

[29]

A. Yes.

Q. Was there something then under their feet?

A. Yes.

Q. So what did you do when you saw that?

A. I saw the black duffel bag which is very commonly used when they transport narcotics. They use black duffel bag a lot. I smelled the scent of marijuana. And I looked up at Mr. Arvizu and I asked him what was in the bag.

Q. What did he say?

A. He kind of put his head down and his tone of voice changed and he stated to open it up and see.

Q. He told you "Open it up and see"?

A. Uh-huh.

Q. Did he do anything with his gestures or anything that was significant to you?

A. His head kind of went down. I've seen this gesture several times when we do apprehend somebody who is conducting illegal activities. Once they give up, once they kind of feel like they have been caught, that is their posture a lot of times. It is kind of an I-give-up thing.

Q. After he said that what did you do?

A. I unzipped the bag partially and looked inside and saw what appeared to be marijuana wrapped in cellophane.

Q. What did you do?

A. I went around the other side of the vehicle and I [30] basically took Mr. Arvizu out of the vehicle, handcuffed him, and placed him in my service vehicle. I asked him if he wanted his rights read in the Spanish or English language. He stated, "English." I did so.

Q. You read him his rights in English?

A. That's correct.

Q. Did you conduct a further search of the vehicle, whether it be at the scene or later on?

A. Yes. We found another bag which contained marijuana in the back of the vehicle.

Q. When you say "the back of the vehicle," what do you mean?

A. Behind the rear seat.

Q. So the duffel bag—correct me if I am wrong, the duffel bag was on the floor in front of the last seat?

A. Correct.

Q. And you found more behind that back seat?

A. On the floor as well.

MS. CABANILLAS: I don't have any other questions at this point, Your Honor.

THE COURT: Very well.

Ms. Brambl.

CROSS-EXAMINATION

BY MS. BRAMBL:

Q. Now, the date this occurred was January 19 of this year, correct?
[31]

A. Yes, ma'am.

Q. That was Martin Luther King Jr. holiday. Is that right?

A. I don't recall.

Q. You don't remember if this was a holiday weekend or not?

A. No.

Q. Now, you mentioned that when you first became aware of the sensor activity, or the call regarding that, that it was around 2:15?

A. Uh-huh.

Q. And you say your shift changes at 3:00?

A. The actual shift comes on at 3:00, or the agents begin clearing the area and heading back to the checkpoint about 2:15, 2:30.

Q. And how many shift changes are there in a day?

A. At that time there was three.

Q. And wherever the agents are then they would go ahead and return between, as you say, 2:15 and 2:30 to the border patrol station?

A. Unless they were occupied at that point, they would begin heading back to the checkpoint.

Q. And you say that's about 30 miles away more or less?

A. The checkpoint—

Q. Let me reask that. The station is in Douglas?

A. The station is in Douglas. That's correct.

Q. Is it close to the border area?

[32]

A. It is within a few miles of the border area.

Q. So when you would leave for shift change would depend pretty much on where you are. If you were right in Douglas, you might not leave until 10 till. If you were way out, you might leave an hour early, right?

A. I don't understand the question.

Q. If your shift changes at 3:00 and, say, you are an hour away, you might actually leave at 2:00, if you are an hour away from your station?

A. No. When I say they return back to the checkpoint, they go from wherever they are at. The ones that are roving around the checkpoint, they usually head back in toward the checkpoint, not to the station.

Q. To the checkpoint?

A. Correct.

Q. So the checkpoint would be at—you are referring to the one at Rucker Canyon and I—State 191?

A. Correct.

Q. So, again, that would depend on how far away you were from the checkpoint when you would return back?

A. There would be varying circumstances, yes.

Q. If you were close by, you might wait until later. If you were further away, you would start earlier?

A. Possibly, depending on what was going on in the area.

Q. So if you were on Leslie Canyon Road doing a roving [33] patrol, you might return up that to Rucker Canyon Road to get to the checkpoint, correct?

A. If you were on Leslie Canyon—I don't understand the question.

Q. Say you are in the middle of Leslie Canyon Road, you look at your watch and you notice it is 2:30, "I have shift change coming up," might not you go up Leslie Canyon Road to Rucker Canyon and head out to the checkpoint that way because it would be quicker?

A. Yeah. There is a chance you may do that, sure.

Q. And although perhaps Leslie Canyon Road is not an extremely heavily traveled road, it is common for you to see other cars from time to time. Is that correct?

A. Common, no, but we do see cars, yes.

Q. Now, the checkpoint that you've referred to and marked on your map with the number 1, is that operational 24 hours a day when it is running?

A. When it is running, yes, it is, ma'am.

Q. But it isn't operational every day of the year. Is that right?

A. That's correct.

Q. How often is that even operational?

A. There is no rhyme or reason to it, just when it goes up. It is decided from the higher-ups.

Q. So a person who wanted to know if there was a checkpoint, [34] they wouldn't be able to know ahead of time necessarily without driving that area to know if it was operational or not?

A. They would know probably because when it does stay up, it stays up for a couple months at a time. Again, there is no rhyme or reason. We don't shut it down like on a daily basis. It is usually through an extended period of time when it goes up.

Q. Do you recall how long your checkpoint had been operational on January 19?

A. No, I don't.

Q. Now, you mention that the sensor activity showed that there was a vehicle on Leslie Canyon Road. Is that right?

A. The original?

Q. Yes, when you first got your call.

A. The northbound vehicle, correct.

Q. On somewhere between Hunt Canyon Road and Rucker Canyon Road?

A. Correct.

Q. So the sensor activity did not relate to border crossing. It wasn't one of those sensors you have right along the border?

A. No.

Q. In fact, that would be, what, 20 or 30 miles north of the border?

A. Correct.

[35]

Q. Was there just one sensor activity notification or were there two?

A. There were two.

Q. And were they both for that same stretch of road between Hunt Canyon and Rucker Canyon or was that only the first one?

A. That was just the first one.

Q. The second one?

A. The second one indicated that the vehicle had began traveling westbound on Rucker Canyon.

Q. So between Rucker Canyon and Kuykendall?

A. Correct, Kuykendall.

Q. And that area both, where the first and second sensor readings were, are again about 20 or 30 miles north of the Douglas border area. Is that right?

A. That's correct.

Q. The shaded area to the east of the area that we've just been talking about where the sensor activity went off, that's all national forest and national monument. Is that right?

A. That's correct.

Q. Are you familiar with the Chiricahua National Monument?

A. Not real familiar, but I know that it exists in that area.

Q. Are you aware that a number of people from Arizona and elsewhere visit that area because it's very scenic?

A. I'm sure they do.

[36]

Q. And there is camping grounds and picnic grounds all in through those mountains and forests?

A. Uh-huh.

Q. Along the road Leslie—from between Leslie Canyon Road and up to Turkey Creek Road, following that route, aren't there numerous roads—side roads

that go off into the monument and the forest to various picnic areas and campgrounds?

A. From Leslie Canyon right here up to Turkey where 181 is?

Q. Yes.

A. Is that what you are talking about?

Q. Yes.

A. No. Actually, there is only one that I know of there is campgrounds and picnic areas and that would be right here at Rucker. It would go eastbound on Rucker actually, not westbound. Between that area is the only legitimate camping ground or picnic area that I know of.

Q. So in Hunt Canyon there is a Hunt Canyon Road?

A. Hunt Canyon is well south of the area we were working. Is this Hunt Canyon? It is kind of hard to read.

Q. It is where you said. Between Hunt Canyon and Rucker Canyon where the first sensor went off?

A. Correct. And Hunt Canyon here—I don't know of any campgrounds, legitimate, organized, campgrounds that are there. If they are I have never heard of them or seen anyone [37] there.

Q. Have you ever seen anyone picnicking or sight-seeing there?

A. Never.

Q. Why is there a road there?

A. I don't know. I believe there is several ranches out there.

Q. Turkey Creek, that would be if you followed Kuykendall Cutoff all the way up, isn't there some picnic and camping grounds up there?

A. On Turkey Creek?

Q. Yes.

A. Not that I know of.

Q. Are you familiar there is a boy scout camp around Rucker Canyon?

A. Yeah. If it is the one I'm thinking of, it would be east on Rucker Canyon.

Q. Right.

A. That wouldn't have anything to do with the traffic that was coming through that day.

Q. All of these roads are public roads, correct?

A. That's correct.

Q. Are any of them gated or you need special permission to enter?

A. Some of the side roads are, but the ones that we are discussing today, no.

[38]

Q. And they are maintained by the state?

A. I don't know who they are maintained by. I know that the Rucker Canyon the graders go through there more often.

Q. And would you agree that on weekends and holidays there is perhaps more traffic on even the rural roads than there is during the week because of recreational use?

A. On weekends and holidays?

Q. Yes.

A. There may be, but, you know, if that is not the case, then the rancher is using the roads during the week. I don't know if there is any increase in traffic during those days out there anyway.

Q. Now, you mentioned that you had received information that Agent Finley sometime earlier had seen a minivan that turned out to be involved in marijuana smuggling on that same road?

A. That's correct.

Q. Are we referring to Kuykendall Road or Rucker Canyon?

A. Both.

Q. And that van—both the marijuana and the van and its occupants were all apprehended with that incident?

A. I know that the marijuana was apprehended. I'm not sure exactly what happened with the van or the occupants. I'm pretty sure they apprehended those as well. I never saw the reports.

Q. So there was no question in your mind that somehow this [39] could be the same van involved in that case?

A. No. That is not what I was indicating, no.

Q. And how long ago in time did that occur compared to the date of this offense?

A. I'm not sure.

Q. Had you personally made any stops on Leslie Canyon, Rucker Canyon Road in the area we are talking about involving marijuana or aliens?

A. Involving marijuana, no. Involving aliens I was the secondary agent on stops. I'd apprehended vehicles in that area before, correct.

Q. You didn't mention those in your report?

A. No.

Q. Is that because you had not had any experience stopping anyone with marijuana or other drugs in their vehicles in that area?

A. I don't understand the question. I'm sorry.

Q. You mentioned in your report and your testimony Agent Finley's experience but not your own in that area. I am just asking is that because you didn't have any marijuana or drug-related stops in that area?

A. That's correct.

Q. About how many sensor hits a day had you been getting in the area where the sensor is activated in this case?

A. I don't recall a day. We usually work ten-hour shifts. [40] I don't know what the whole day would consist of as far as sensor hits. It seems like it may go off once every couple hours or so.

Q. So in an eight-hour shift, maybe four times or more?

A. Maybe, depending on the day, sometimes less, sometimes more.

Q. Now, you mentioned that the vehicle—the minivan slowed down dramatically to about half its speed when you saw it?

A. Approximately.

Q. And you would agree that that is a fairly common reaction when people see law enfor[ce]ment, maybe not everyone, but even law-abiding citizens sometimes do that?

A. They slow down to half speed, no. I don't think that is common.

Q. So how fast or how much did the—when it slowed down, how fast was it going?

A. I didn't have radar. I'm not certified to determine speed. I could approximate maybe 50, 55 and slowed down to maybe 25, 30. I am guessing.

Q. I was going to ask, guesses and approximations?

A. Correct.

Q. When it passed you were stationary. Is that right?

A. That's correct.

Q. So it is not like you could clock it because you were going behind it?
[41]
A. No, not once it passed me.

Q. I'm assuming that you didn't see any driving behavior that caused—that was hazardous for either yourself, Mr. Arvizu, or other people who might be on the road?

A. Driving behavior that was hazardous?

Q. Right.

A. The abrupt turn was a little intense, but other than that, no, just the fact that he was going kind of fast and he slowed down.

Q. He wasn't creating a traffic obstruction or anything either?

A. No.

Q. And in fact you didn't make a traffic stop. Is that right?

A. No, it wasn't a traffic stop.

Q. And just for the record, the full name of the Kuykendall Road is Kuykendall Cutoff Road. Is that right?

A. Kuykendall Cutoff.

Q. However you say it.

A. Kuykendall Cutoff Road.

Q. And it's a cutoff because it is a shortcut. Is that correct?

A. That I don't know.

Q. You have driven in that area a lot. Haven't you noticed that it is shorter to go that way than to go the long way [42] around?

A. Depending on where you are coming from. Coming from Douglas it is absolutely not shorter. It is quicker to take the highway. If you are coming from another area, maybe way out here, it might be shorter.

Q. And you stated that when you first saw the driver and looked over at him that he was sitting stiffly and tightly gripping the steering wheel. Is that correct?

A. Right.

Q. Wouldn't you agree that a fairly common reaction among even law-abiding people is to sometimes do just that, sit stiffly and pay extra attention to driving when they notice law enforcement?

A. Actually, no. In my experience, when we sit and do traffic observations or road patrol, most of the citizens look over and see what is going on. They want to see what is going on, especially when they see it is law enforcement. Most of them look. In that area most of them would give us a friendly wave. The driver would give us a wave.

When they did stiffen up and get real rigid and their posture was that stiff, it usually indicated that they were trying to hide something.

Q. So the fact that Mr. Arvizu and his passengers didn't smile and wave at you, that made you feel suspicious?

A. The fact—his mannerisms that he had when he became [43] stiff and rigid and didn't acknowledge that I was in the area, that was suspicious, yes.

Q. And you've also mentioned that the children who were passengers, at least a couple of them, their knees looked to be higher up than normal, as if maybe they were—their feet were resting on something?

A. Correct.

Q. And you mentioned that their knees were about level with the seat. You mean the bottom part of the seat where they would be—how high up were they, I guess is what I want to know, level with the bottom of the seat, their shoulders or—

A. Higher than normal. Not as high if the kid puts his feet up on the seat and you know how his feet are chest high, not like that. It was higher than normal. You could see there was an elevation there. It looked awkward because the feet were in the normal foot space but at a higher level which was very suspicious.

Q. They weren't as high as chest or shoulder level?

A. No.

Q. You obviously couldn't tell what they were resting on, whether it was pillows or luggage or—

A. No, I couldn't.

Q. —or anything else?

A. I couldn't tell.

Q. Now, you said that the driver and passenger not smiling [44] and waving at you was unusual. You also found it unusual or suspicious that the children began waving to you?

A. Yes. The reason that was suspicious is because usually, from what we can see when kids wave to the border patrol agents, they turn and wave and you can see it is a genuine wave. The oddity in this particular circumstance is that they continued facing forward and their hands all kind of went up at the same time and they were moving their hands around. To me it seemed like they were being instructed. That was just something that I noticed that was very odd to me.

Q. But doesn't just about every kid in the world wave at you guys?

A. A lot of children do, but they usually turn and wave.

Q. And do you know whether the sensor activity in the area that—the two areas we have discussed, did that go off at all within—after Mr. Arvizu's car passed through?

A. From what I am aware when I was out there, it had not, no.

Q. I want to talk for just a second about the turnoff. You said that for maybe several hundred yards he had his indicator on indicating that he would be turning from Rucker Canyon onto the Kuykendall Cutoff?

A. Yes. I don't know exactly the distance, but, yeah, he turned it on prior to that turnoff.

Q. Was it on for like a few seconds, like half a minute?
[45]
A. It was on kind of early. I noticed that it went on kind of early and then it went back off, and then right before he turned, it went on again.

Q. And how long was it turned off, just for like a matter of five seconds, or was it quite awhile it was turned off?

A. I don't recall the time, but I recall that it was off for the amount of time I noticed it was off, and then it went back on as if maybe he changed his mind about turning.

Q. So fairly brief time that it was off?

A. Probably.

Q. Then it went back on and almost right away he turned onto the road?

A. Correct.

Q. About how far behind him were you at this point?

A. Maybe a couple of car lengths. I can't recall exactly. A few car lengths.

Q. Is that pretty much what you stuck to the whole time you were behind him until you did the stop?

A. No. Originally I got a little bit closer so I could get a reading on the license plate. Then I backed off and followed him from a greater distance.

Q. Now, the roads that we have been talking about so far, Leslie Canyon is a pretty flat, well-maintained road. Is that right?

A. It's maintained by somebody, yeah.
[46]
Q. It is not real bumpy or—

A. Leslie Canyon?

Q. Uh-huh.

A. No, it is not real bad.

Q. That is true of Rucker Canyon Road also. Is that right?

A. Rucker Canyon—

Q. At least the stretch we are talking about?

A. The stretch we are talking about yeah. It gets rougher once you get into the forest area. It gets pretty rough.

Q. And none of these roads are four-wheel-drive-only roads, correct?

A. No, not only, but normally.

Q. So you would normally use a four-wheel drive even on Leslie Canyon Road?

A. Not that I would normally use, but that is the normal traffic that we see out there.

Q. And is that also—you mentioned your service vehicle, that you are not supposed to take sedans on certain roads. Would Leslie Canyon Road be one you take your four-wheel drive border patrol vehicle on?

A. Would we take a four-wheel drive on Leslie Canyon? Sure we would take a four-wheel drive.

Q. The road is perhaps slightly rougher once you get off onto Kuykendall Cutoff. Is that right?

A. Yes, Kuykendall is rougher.

[47]

Q. Even that road is not a four-wheel-drive-only road?

A. No. You can pass through in a sedan or a van. I've seen—in the past I've seen exhaust—or the mufflers and stuff on the side of the road. Sometimes when it gets washed out, it gets pretty bad and the cars scrape.

Q. The day you were on there the road wasn't washed out?

A. Was it washed out? Is that what you are asking?

Q. It was not washed out. Is that right?

A. I don't recall.

Q. You probably would have mentioned that in your report as a factor if it had been. Is that correct?

A. I did mention the terrain as a factor, yes, I did.

Q. There is nothing in your report to indicate that any portions of that road had been washed out, though. Is that correct?

A. No, there is nothing indicating that.

Q. At the point you made the stop, about how far from the border were you?

A. When I made the stop?

Q. Yes. You would be at least 30 miles. Is that right?

A. Probably.

Q. Maybe a little more?

A. Maybe a little more.

Q. When you did the registration check, that was pretty much when you started to follow the vehicle?

[48]

A. If I recall correctly, I did the registration check at about the time he turned or so, something like that.

Q. At the time he turned onto Rucker Canyon from Leslie Canyon?

A. No.

Q. Or from Kuykendall?

A. Around Kuykendall, if I recall correctly.

Q. The van was not stolen?

A. No, the van was not stolen. I did a registration check and to see if it was stolen.

Q. It wasn't from Mexico. It had Arizona plates, correct?

A. Correct.

Q. The plates were registered to Leticia Arvizu in Douglas?

A. Right.

Q. The address was 403 4th Street?

A. Correct.

Q. Now, you said in your testimony that this area—general area was I believe you used the word "notorious" for drugs and alien smuggling?

A. Correct.

Q. Would you agree in your report when you described the area you said that it was extremely popular for alien smugglers to use when stashing aliens before transporting them north?

A. I did state that.

[49]

Q. You didn't mention anything about drugs in your report in that area?

A. No, I didn't.

Q. And you also mentioned that you were—or your agency was familiar with several addresses in that area that had problems associated with them for alien smuggling?

A. Correct, and several groups are apprehended daily in that area attempting to get into stash houses and such there.

Q. But this particular address, 403 4th Street, that wasn't an address familiar to you or information you received from your agency that there had been problems there before?

A. I don't understand the question.

Q. 403 4th Street you have never apprehended aliens or determined that that was an alien smuggling location?

A. Have we apprehended? I don't know if we have apprehended aliens.

Q. Certainly you had no information before you when you made the stop like that, correct?

A. That that particular address, no.

Q. Yes. The same with drug trafficking, nothing to put a hit on that particular house?

A. Right. Just the general area is—like I said, it is very notorious for that type of smuggling.

Q. And the same with Leticia Arvizu. There was nothing in the information you had before you that that was a name [50] involved with alien or drug smuggling before?

A. Correct. Very rarely do I make a stop that we know prior that this person was involved.

Q. Now, your report indicates that you stopped Mr. Arvizu's vehicle not because you thought it had drugs in it but to perform an immigration check on the occupants. Is that right?

A. Correct.

Q. Now, you had a clear view when you were following that there was a passenger, a driver, and children, correct?

A. Correct.

Q. Was there anything about their appearance that made you suspect they were illegal aliens?

A. About their appearance, no, not about their appearance. About their mannerisms, yes, about the mannerisms about the way—all the circumstances, the totality of the circumstances I mentioned, all of them led me to believe there was some type of illegal alien smuggling involved.

Q. And did the vehicle stop right away when you—I'm assuming you turned on your lights first?

A. Correct.

Q. Then did it stop pretty much right away?

A. It did.

Q. No attempts to flee or evade you?

A. No.

Q. Now, when you stopped the vehicle, did you go up to the [51] driver's window?

A. Yes, I approached from the driver's side.

Q. And did you, for officer safety reasons, put your hand on your gun or take the gun out of the holster?

A. No.

Q. Why didn't you do that?

A. Why didn't I do that?

Q. Right.

A. It is not common practice to do that for me. During daylight on a vehicle stop when there are children involved that is not something I practice.

Q. And your first question was asking Mr. Arvizu if he and his passengers were U.S. citizens, or did you ask him first where he was going?

A. He initiated the conversation. He stuck his head out the window and asked how I was doing. He was starting the small talk. So I asked him, "Hey, where are you guys coming from? Where are you heading to?" Shortly after that is when I asked him about his citizenship, correct.

Q. Did you ask him to show you any kind of proof that he and the occupants were U.S. citizens, or were you satisfied?

A. It's not mandatory for U.S. citizens to provide proof. It is our—it is our duty to determine their alienage through the questioning. That is why I continued the questioning.
[52]

Q. So after he answered you in fluent English that he was a U.S. citizen, were you still suspicious that he might not be?

A. I was suspicious that he might have somebody or something in the back because of his nervous behavior that there was something wrong. It wasn't normal. When we have traffic stops with somebody who is not doing anything wrong, their behavior is quite different.

Q. And did you ask him if there was anyone hidden inside the vehicle?

A. Yes.

Q. He answered no?

A. Correct.

Q. And do you remember what your exact words were when you asked if you could look around or inside the vehicle?

A. I don't know exactly, but my normal response is "Would you mind if we take a look inside and search the vehicle?" That is what I believe I said.

Q. You didn't write down in your report the exact words that you used, correct?

A. I don't think I did.

Q. And do you remember exactly how he responded or what he said?

A. The exact words no, but he indicated sure, why not type reaction, no objection.

Q. And you didn't ask for written permission to look inside?

[53]

A. No.

Q. He didn't sign a consent or anything?

A. No. That is also not normal.

Q. And during this time your testimony is you didn't have your hand on your firearm or have it withdrawn for any reason?

A. No, I didn't.

Q. Did you tell Mr. Arvizu that he had the right to refuse to give you consent to look inside his car?

A. No. I simply asked if he would mind.

Q. Before you asked to look inside, you did not read him his Miranda warnings. Is that correct?

A. That's correct.

Q. You only read those after you looked inside and found what appeared to be marijuana?

A. Correct.

Q. And it wasn't until after Mr. Arvizu—until you asked whether you could look in the car that you put your head in the window. Is that right?

A. Correct. When I walked around the vehicle and the passenger side window was open, that is when I wanted to make sure it was okay to open the door. And it was

unlocked. He said, "Sure, no problem." It was unlocked.

Q. It was after all that happened that you put your head inside the vehicle and you noticed an odor of marijuana?

A. Correct.
[54]

MS. BRAMBL: Can I have a moment, Your Honor?

THE COURT: Yes, you may.

MS. BRAMBL: Can I approach the easel?

THE COURT: Yes.

BY MS. BRAMBL:

Q. I have one more question about the turnoff.

From Rucker Canyon to Kuykendall, the intersection there—

MS. BRAMBL: Can I go back and get a picture?

THE COURT: Yes.

MS. BRAMBL: May I approach the witness?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. I'm showing you what has been marked Exhibit Number 5. Does that depict the area where the vehicle turned onto Kuykendall Road?

A. I believe it does. It looks familiar.

Q. That intersection is kind of a three-way intersection because it's got Rucker Canyon and Kuykendall and Rucker Canyon going the other way. Is that right?

A. Rucker Canyon runs straight through. It is like a T.

Q. There is sort of like a little island in the middle?

A. Correct.

MS. BRAMBL: That is all the questions I have.

THE COURT: Thank you.
[55]
Ms. Cabanillas.

REDIRECT EXAMINATION

BY MS. CABANILLAS:

Q. Ms. Brambl asked you some questions about the children waving and what she considered to be the normal behavior in kids. Is it the waving that you found to be significant or the manner in which the waving occurred?

A. It was the manner.

Q. Just to refresh our memories, how long did the children keep up this behavior?

A. They did it for approximately four to five minutes.

Q. Ms. Brambl also asked you about your conversation with Agent Finley about—Agent Finley, is that his name?

A. Correct.

Q. Who was the one who told you about the van. Do you remember that?

A. Uh-huh.

Q. She asked you whether he had made the apprehension of those people. What was your response to that?

A. If he had made the apprehension of those people?

Q. The individuals that were throwing out marijuana.

A. I believe he did.

Q. Was it—as far as the fact that he may or may not have apprehended those people, was there anything significant with the fact that—with the type of vehicle that Agent Finley [56] had discussed and the type of vehicle you saw in this case?

A. That was the significance of it was the type of vehicle used on the prior case in accordance with this case.

Q. She asked you some questions about the general area too and she was asking you about picnic areas and such. Where the first sensor went off, you stated that was where again, in the general area?

A. Between Hunt and Rucker Canyon.

Q. Did you state whether or not you found this particular vehicle the defendant was driving was from that area? Did you indicate you thought it was a vehicle that was normally from that area?

A. Yeah, I had never seen that vehicle in that area before.

Q. Hunt Canyon I believe Ms. Brambl was making generalizations about the picnic areas and such. Are you familiar with any off Hunt Canyon Road?

A. That is negative. I'm not familiar with any.

Q. Are you familiar with the fact that there may be a sign there that indicates there is no picnic grounds?

A. I believe there is.

Q. Well, when I say that, I don't know whether the sign says no picnic grounds or not. Do you know whether there is a sign that says that?

A. There is a sign—I don't recall what it says. There is a sign on that road that indicates that—I think it is a [57] forest service sign or something to that effect. I don't believe there is picnic areas on that route of travel.

Q. Do you know whether or not that is a route towards private residences?

A. I think it is. I think—it has always been my impression that area was either a forest land road or not to the campgrounds but to a ranch in that area. I see ranchers come off that road.

Q. So in your knowledge and experience then, would it seem likely this particular vehicle was doing an outing, having come from Hunt Canyon Road?

A. No. I don't think Hunt Canyon is traveled—you can travel in a minivan or sedan on that road.

Q. Do you know if the vehicle had not come then from the area of Hunt Canyon Road, where would it have come from on the south?

A. It would have had to have come from the Douglas area. If it didn't come from here, there is really not a lot of options back here. Most likely it would have come from the Douglas area and gone north.

Q. Most likely it would have come from Douglas?

A. Correct. The other area it may have come from would have been McNeal, but that would have been the long way around.

Q. And I think I asked you about apprehensions in that area. You stated—how many times did you state that you have—[58] you personally or other agents seized illegal aliens or drugs in that particular area we are talking about?

A. There has been several apprehensions in that area. I mean, when the checkpoints are up, it is on a daily basis. Me personal I have been a secondary agent to many. I've had apprehensions. I don't know how many. I've had apprehensions in that area as well.

MS. CABANILLAS: I don't have anything else, Your Honor. Thank you.

THE COURT: Ms. Brambl.

MS. BRAMBL: I have no further questions.

THE COURT: Thank you, sir. You may step down.

MS. CABANILLAS: That is the government's only witness.

THE COURT: Ms. Brambl, does the defense have any witnesses?

MS. CABANILLAS: May Agent Stoddard remain as my case agent?

THE COURT: Yes.

VICTOR CHACON, DEFENSE WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Victor Daniel Chacon. C-h-a-c-o-n.
[59]

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. Where are you employed?

A. I'm staff investigator with the federal public defender's office here in Tucson.

Q. And how long have you been there?

A. Seven years.

Q. And before that what kind of work did you do?

A. I was with the Tucson Police Department.

Q. And can you briefly tell me about your experience there?

A. I was a patrol officer. I was a detective. And the last seven or eight years I was a supervisor, a sergeant. I supervised officers in the field as well as investigators and detectives. I was in charge of the hostage negotiations unit. I ran a substation, the west side substation. It was called Adam 1. That was in essence a small police department in itself. It had investigations, crime prevention, patrol, budgeting, and all that part of police work.

Q. Thank you.

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

MS. BRAMBL: Your Honor, if I could approach, this Exhibit 1-A is a somewhat smaller version of that.

THE COURT: Very well.

BY MS. BRAMBL:

[60]

Q. Can you tell us what you did in connection with your investigation in this case?

A. I went out to the area as indicated in the officer's reports and drove around and took some photographs.

Q. And can you tell us the map that has been marked as Exhibit 1 just generally what that depicts?

A. I'm having some difficulty. May I step down?

Q. Sure.

A. It's a map of that area of southeastern Arizona from the Arizona-New Mexico county line—or state lines to an area east of Elfrida and from the Mexican border all the way up to just south of Willcox, Arizona.

Q. And can you show us on the map the routes that you traveled in connection with investigating the case?

A. Yes, I can. Actually, I started up here and drove all the way down from I-10. I drove all the way down 191 to Rucker Canyon where Rucker Canyon and 191 intersect. I drove east along Rucker Canyon Road and up to Kuykendall Cutoff Road and then north along Kuykendall Cutoff all the way up to 181, at the intersection of 181, Kuykendall and Turkey Creek Road.

And then later on I went back and drove again from 191 along Rucker and then down Rucker Canyon Road to Leslie Canyon Road and then all the way down into Douglas on Leslie Canyon Road and get a real clear—anyway along Leslie Canyon Road all the way into Douglas.

[61]

Q. And does that map accurately depict the route that you took?

A. Yes, it does.

MS. BRAMBL: I would move for the admission of Exhibits 1 and 1-A.

THE COURT: Shall be admitted.

BY MS. BRAMBL:

Q. Can you tell us what the road conditions were like perhaps starting from Leslie Canyon Road and working your way up to Kuykendall?

A. Actually, I started the road beginning at the south end of Leslie Canyon Road which actually starts right at the front step of the border patrol station. The road is paved for about ten miles and there is residences all the way around on both sides. Then approximately 24 miles from Kuykendall Road the road is dirt and well maintained, obviously used. Generally the area itself is not heavily populated, but there are people living out there in and around ranches. Up to Kuykendall it is pretty much as the officer described it, somewhat remote.

Q. And what kind of vehicle did you drive on the road?

A. I drove—on the one occasion I drove a 4X4, but it didn't require the use of that option. On another occasion I drove just a two-wheel-drive vehicle.

Q. When you drove on Kuykendall Road in particular, were you [62] required to use your four-wheel drive at all?

A. No, not at all.

Q. At any point in your travels were there any signs informing you from Leslie Canyon all the way up

through the end of the Kuykendall Cutoff Road that you had to use a four-wheel drive on the highway or those roads?

A. No.

Q. Were there any warnings or restrictions at all about travel on those roads?

A. Not on those roads, no.

Q. Were there other restrictions perhaps on other roads in that area?

A. Yes, there was. Off of Kuykendall Road about—I think about four miles north of Rucker Canyon there was a side canyon, I don't recall, Bradshaw Canyon, or something like that, where there is a forest service sign that says, "High occurrence [*sic*] vehicles recommended endurance."

Q. On any of your trips on those roads, had it been raining recently?

A. No.

Q. You can go ahead and have a seat.

I would like you to take a look at Exhibits 3 through 9. If you can, briefly tell us what general area they depict and then what each picture shows.

A. This is Exhibit Number 3 I took at mile 18.6—or [63] milepost 16 looking towards Douglas on Leslie Canyon Road. It depicts the desert on both sides of the roadway and a very flat roadway. I was looking south, I believe, at this point, yes.

Q. Thank you.

A. Then Exhibit Number 4 was at mile 20.4 from Kuykendall and Rucker Canyon Road intersection. I'm still looking south. This is where the Leslie Canyon Road or McNeal Road splits off from Leslie Canyon Road and then goes west. McNeal—I'm sorry—Leslie Canyon continues south to the left. Again, the roadway is very flat and well maintained and well used according to the roadway.

Exhibit Number 5 I took at the intersection of Kuykendall Cutoff and Rucker Canyon Road, and I took this from the west side of the little desert island that is in the middle of the roadway where they converge there. At that point I'm looking southeast onto Rucker Canyon Road and the photograph also has a street sign, Kuykendall Road Cutoff, and the back of a yield sign and there is a yellow sign farther to the south. I really can't read what it says. But they are typical road signs.

Then Exhibit Number[ ] 6 is also a photograph of Rucker Canyon Road where it intersects with Leslie Canyon Road. There is the road sign. The one closest to me is the T sign indicating that there is an intersection, you are [64] approaching an intersection. Then the next sign says, "Stop ahead." Then at the intersection there is a stop sign and arrows indicating the road goes in both directions at that point, and also the roadway at this point is very flat.

Number 7, Exhibit Number 7, I took at mile 17.3 from Kuykendall Road and on Leslie Canyon Road. And this is a depiction of a monument. I couldn't read what it says there. It is an old monument. Also depicts the roadway and how it is graded.

MS. CABANILLAS: Your Honor, on that exhibit, did he say Kuykendall at Leslie Canyon?

THE WITNESS: I said this is 17.3 miles from Kuykendall on Leslie Canyon Road.

MS. CABANILLAS: Thank you.

THE WITNESS: Then Number 8 I took eight miles from Kuykendall Cutoff looking south and it just depicts again the character of Leslie Canyon Road at that area.

And then Number 9 shows the road character looking west at the intersection of Leslie Canyon and Rucker Canyon Road. There is a sign there "Frontage road"—I'm sorry—"Primitive road drive with care," and below that sign is a precautionary speed limit sign that says 35 miles per hour. The road curves off to the left or to the west at that point. And, again, the road character is flat and well maintained.

BY MS. BRAMBL:

[65]

Q. Do Exhibits 3 through 9 accurately depict the way the road looked when you were driving it?

A. Yes.

MS. BRAMBL: I would move for the admission of Exhibits 3 through 9.

THE COURT: Any objection?

MS. CABANILLAS: Can I see 3 through 9, Your Honor?

THE COURT: Yes, you may.

MS. CABANILLAS: Other than general relevancy grounds because it is so far away from where the activity occurred, I have no objection to general ability for knowledge.

THE COURT: Shall be admitted.

BY MS. BRAMBL:

Q. I would like you to take a look at—

MS. BRAMBL: May I approach and publish?

THE COURT: Yes.

BY MS. BRAMBL:

Q. Would you take a look at Exhibits 10 through 14 and tell me what area they depict?

A. They depict that area between Rucker Canyon and 191 and Kuykendall Road on Rucker Canyon.

Q. And can you just describe briefly what is set forth in each picture?

A. Exhibit Number 10 is the intersection facing south of [66] Rucker Canyon Road, Courtland Road, and Highway 191. I took this photograph from the north of the intersection.

Number 11 is essentially the same photograph, a little bit closer view, with a vehicle turning south out of Rucker Canyon Road and another vehicle at the intersection facing east on Courtland Road.

Exhibit Number 12 is a photograph at the intersection of Kuykendall and Rucker Canyon Road facing west along Rucker Canyon Road essentially showing the character of the roadway of Rucker Canyon Road traveling west from that point.

Exhibit Number 13 is a photograph on Rucker Canyon Road as I was traveling east, and I took the photograph as I was driving, of a vehicle coming west on Rucker Canyon Road from the area of Kuykendall Cutoff.

Exhibit Number 14 is a photograph of the character of Rucker Canyon Road facing east just before one arrives at the intersection of Kuykendall and Rucker Canyon at milepost number 6 and it shows, again, the road is well traveled and often maintained.

Q. Do those photographs accurately depict the way the road appeared when you were driving it and taking pictures?

A. Yes.

MS. BRAMBL: I move for the admission of Exhibits 10 through 14.
[67]

MS. CABANILLAS: Can I see 10 through 14, Your Honor?

THE COURT: Yes, you may.

MS. CABANILLAS: Thank you.

No objection.

THE COURT: Shall be admitted.

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. Would you finally take a look at Exhibits 15 through 33 and just tell me what area or part of the road they depict?

A. These photographs depict that area between Kuykendall and 181 on Kuykendall—I'm sorry—between Rucker Canyon and 191 on Kuykendall Road Cutoff.

Q. You drove the whole length of that road, correct?

A. Yes.

Q. Are the pictures uniform in showing—are the road conditions variable on that road or uniform?

A. Actually, there is only one wash that traverses that entire seven-mile length. Other than that the road is uniform.

Q. Is that what those pictures depict?

A. Yes.

Q. Do they accurately depict the road as you saw it when you drove on it?
[68]
A. That's correct.

Q. And were there any rough portions of the road that somehow were not photographed?

A. No.

MS. BRAMBL: I move for the admission of Exhibits 15 through 33.

MS. CABANILLAS: Please.

No objection.

THE COURT: Shall be admitted.

MS. CABANILLAS: What were the numbers again?

MS. BRAMBL: 15 through 33.

MS. CABANILLAS: Thank you.

BY MS. BRAMBL:

Q. About how far was it from the area of the Kuykendall Cutoff and Rucker Canyon Road to the border patrol station in Douglas?

A. Almost 35 miles.

Q. And that was the mileage that you kept track of and made a note of?

A. Yes.

Q. And were you able to determine whether Kuykendall Road was a shortcut from any location to any other location?

A. Yes.

Q. Tell us about that.

A. May I show you on the map?
[69]

MS. BRAMBL: May the witness step down, Your Honor?

THE COURT: Yes, you may.

THE WITNESS: Actually, as I said before, there is residences all the way up to about 24 miles from that area. As one approaches Douglas, you have ranches and settlements here. There is a settlement in Hunt Canyon there and the road is maintained by the state. There is signage that indicates that.

Then once you get to 191, you have the settlement of Sunizona. There are residences all along 191 all the way up to the intersection of Turkey Creek and Kuykendall. There is also homes along the road that lead up to the monument. And then this road itself will eventually wind up around Bowie.

And so that if in fact you are living along the roadway between 191 and 186, then this would be certainly a shorter route if you are traveling to Douglas rather than have to drive all the way out to 191 and travel down south into Douglas or vice versa. If you live in the area and need to go up, that is a shorter route to take, Kuykendall.

Q. Can you describe—you mentioned you saw a number of houses and ranches—just where some of the bigger locations or more populations occur?

A. Along 181 you have Sunizona. There is schools there. There is homes that are all up in here along into the desert. There is a home—fairly beautiful home

about this area here. [70] I think there is two settlements here.

Q. Where are you describing?

A. Just north of the intersection of Kuykendall and 181 as you approach or head towards the Chiricahua National Monument in this area here. There is one beyond, a little ranch, where I turned back around. There are homes again all in this area. You can see there is a number of streets up here. And if you want to travel in that area, it is certainly more practical to travel that area rather than on 191. I think it is 12-point-some-odd miles back out to 191 from that area.

Q. And to the east of the area we are talking about and the monument or close to it, can you describe some of the locations that you are familiar with there as far as picnicking or destinations that people might go to?

A. Well, this roadway that we are discussing, Kuykendall, Rucker Canyon, a lot of people use this for biking. There are roads in the monument itself that people use for biking, and associated with that you have camping and whatnot. And there is no obstruction, anybody can go anywhere within the monument that is accessible and do camping and picnicking and that sort of thing.

Q. Is that a common location for people who live in Douglas to use for recreation?

A. Yes, it is.

Q. I think you can have a seat again.
[71]

Can you briefly describe to us the intersection of Rucker Canyon and Kuykendall Road?

A. Well, it is a confluence of both those roads, and Rucker Canyon begins at 191 and then angles and turns south at that location. Kuykendall runs off of that and goes north. So you have these two roads that ease into one another. Rucker Canyon, I have to draw it to describe it properly.

MS. BRAMBL: May he use the easel, Your Honor?

THE COURT: Yes, you may.

THE WITNESS: As I said, this hopefully will explain it. This hopefully depicts that intersection, the confluence of these two streets.

What occurs is that Rucker Canyon comes around kind of in a circle in this manner. Kuykendall joins it going north. And there has been another road cut just on the west side creating kind of an island. But there is no corners there so that they both generally melt into one another in any direction that you go. There is a street sign here and there is also a mailbox, I think, in the middle. I'm not sure what ranch that belongs to. But essentially that is what the intersection looks like.

BY MS. BRAMBL:

Q. Can you draw like a continuous line from the description of where the vehicle in Mr. Arvizu's case would have been coming north on Rucker Canyon and how it would proceed onto [72] Kuykendall?

A. My understanding is that Mr. Arvizu came from Rucker Canyon from the south and then turned onto Kuykendall Road in this manner here. This is all just circle. I will indicate that arrow by writing a 1 and circling it next to it.

MS. BRAMBL: Thank you. I would move for the admission of Exhibit 34 for illustrative purposes.

THE COURT: Any objection?

MS. CABANILLAS: Only on relevance, Your Honor.

THE COURT: Shall be admitted, overruled.

MS. BRAMBL: That is all the questions I have on direct.

THE COURT: Very well.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. You said you work with the federal public defender's office?

A. That's correct.

Q. How long have you worked with the public defender's office?

A. Seven years.

Q. In your experience you stated you had some law enforcement experience?

A. That's correct.

Q. What were the locations you stated you worked?
[73]
A. Well, actually, I worked all over Tucson.

Q. In Tucson?

A. Yes.

Q. Have you ever worked in the Douglas area?

A. No. I lived there.

Q. As far as these roads are concerned, I believe you stated you agree this is a remote area where this is taking place? I think you stated that on direct?

A. Yes.

Q. You stated that—when you were driving around taking these pictures, you were driving what car?

A. On one occasion I drove—well, they are both Jeeps. One is a 4X4 and the other one is not.

Q. But they are both Jeeps?

A. Yes.

Q. The white Jeep that is in these pictures, sort of, is that the one you were driving?

A. Yes.

Q. That is not a minivan. Is that correct?

A. It's not a minivan?

Q. Correct.

A. I don't know. Some people might call it that. I don't know.

Q. What kind of vehicle is this?

A. A Jeep.
[74]
Q. Jeep Cherokee?

A. Yes.

Q. Jeep Cherokee is not a minivan?

A. I don't know. If you want to call it that.

Q. I wouldn't. I am just wondering.

A. I wouldn't either.

Q. Just checking there.

You stated that on Kuykendall there was a point where there was a sign that said "High clearance vehicles"?

A. "Recommended."

Q. That was on Kuykendall?

A. It was a road off of Kuykendall.

Q. You stated that—on direct Ms. Brambl asked you whether or not these pictures of Kuykendall—if there were any rougher parts of Kuykendall that you hadn't taken pictures of. I notice there was quite a delay. Would you agree there are parts of Kuykendall that are a little rougher than the pictures you have taken?

A. I was looking at the very first part, the very first photographs. That is probably the roughest it had gotten. I was trying to recall if there was any other part. That is why I indicated there was one other area and that was where the only wash that I saw traversed the roadway and I did take a photograph of that.

Q. But would you agree then there are rougher parts then [*sic*] [75] were reflected in your picture?

A. No.

Q. You stated that you took a picture of what then? Perhaps, I'm sorry, I misunderstand.

A. The rougher area I could see was at the very beginning of Kuykendall at the intersection. Apparently it had not been graded in awhile, that entire area. That was the roughest I saw. The only other area that came to mind that you could consider rough on a roadway is that area that I did photograph of the wash that traverses the roadway, the only wash. Otherwise, the road is as I photographed it.

Q. Do you recall that as you were driving on Rucker Canyon there was a creek that sort of traversed just before Mountain Queen Road? Do you remember seeing a creek, driving through a creek?

A. Can you give me a better reference point?

Q. Sure. Hold on.

Showing Government's Exhibit 41. My question would be, using the pointer: Do you remember a creek running across—traversing Rucker Canyon Road just

short of Mountain Queen Road or just past Mountain Queen Road? Do you remember that?

A. No, I do not.

Q. Is it possible on the date of this stop there might have been a creek like that?
[76]

A. On Rucker Canyon?

Q. Yes.

A. More than likely.

Q. What date did you say you took these pictures? I'm sorry. I have forgotten.

A. I don't think I said. But I think it was September 11 and September 28.

Q. September 11 and 28?

A. Yes.

Q. So that was this year then?

A. Yes.

Q. About nine or so months then after the stop in this particular case that happened in January?

A. Apparently so, yes.

Q. Could the road then in January have been different or more rugged than the road that you traveled nine months later? Is that possible?

A. It is possible that it was even better then. I don't know.

Q. You stated, and I got confused, that—when Ms. Bramble asked you whether Kuykendall Road was a shortcut for anything, you described—I think you said if you live along 186. I didn't quite understand. Can you explain that again, how is it that Kuykendall is a shortcut? Explain what that one was.

A. It is called Kuykendall Cutoff. That means that it is a [77] shortcut, number one. If you live anywhere east of 191 anywhere along that roadway, I think 186 is part of that area, then it certainly would be a shortcut.

Q. If you live east of 191, then you mean like east of Elfrida and east of those places?

A. East of Sunizona, anywhere east of 191.

Q. And if somebody travels from Douglas and they are trying to get to, let's say, the I-81 cutoff there that runs east to west north of where we are talking about?

A. Yes.

Q. You measured that in miles. Is that what you are saying? You drove the back roads and the highway and I seem to recall you saying that it was about 12 miles?
A. From the intersection of Kuykendall, Turkey Creek, and 181 back to 191 is 12.3 miles, or something like that.

Q. Would you agree with me if you are coming from Douglas and heading up north that 191, the route that leads from Douglas straight up to where the checkpoint was located, would be the quickest route?

A. To do what?

Q. To get north.

A. Where north?

Q. North to Tucson.

A. Not to Tucson. But if I wanted to get—if I wanted to travel east on I-10, that would be the shortest way, wind up [78] east of Willcox in the Bowie area, if you take that roadway.

Q. Let me rephrase my question. To get to a major highway then north of where we are talking about, the quickest route from Douglas is the route that would lead to the checkpoint. Is that true?

A. I'm sorry. I'm losing you.

Q. The highway that is north of the area we are talking about, which would be the next major road to hit, if you are traveling from Douglas and you want to hit that major highway, would the quickest route be I-191 that leads up through where the officer said the checkpoint was that day?

A. Again, depends on where you want to go. I don't know.

Q. And I am asking you particularly the highway that you just spoke of, the one that would be east?

A. Yes.

Q. Would you agree that Douglas—from Douglas to that highway would be the quickest route?

A. Depends on where you want to go, if you want to go east or you want to go west.

Q. If you are going—maybe you can clarify this for me. Where does 191 take you? Where does it hit north?

A. It leads up to I-10 just west of Willcox.

Q. So it leads to I-10. Let me clarify. The quickest way from Douglas to I-10 would be down Highway 191 north?

A. I will answer you again. Depends on which direction you [79] want to go.

Q. Would you agree that 191 is paved?

A. Sure.

Q. And the road—Leslie Canyon and all the other roads we have been discussing about, Rucker, Kuykendall, they are all dirt roads?

A. Until you get up to 181. Beyond that it is paved.

Q. Let me clarify. Then from Douglas, Leslie Canyon north, the road Leslie Canyon which leads north from Douglas, would you agree that starts being dirt—at this point north of Douglas there comes to be a point when it becomes a dirt road?

A. Yes.

Q. Then it leads all the way north and hits Rucker Canyon?

A. Yes.

Q. And leading up to that Rucker Canyon is dirt?

A. Yes.

Q. And then leading—then Rucker Canyon itself is a dirt road from the intersection of Leslie to at least east of Kuykendall. Is that right? Rucker is a dirt road from Leslie Canyon east of Kuykendall?

A. Rucker runs east and west.

Q. Right.

A. That is dirt.

Q. When you say east and west—

A. And it goes south and then east again into the monument, [80] yes.

Q. And my question is: When it hits Leslie Canyon, it's a dirt road, right?

A. Yes.

Q. And when it hits Kuykendall, it's a dirt road?

A. Yes.

Q. Then Kuykendall is a dirt road all the way until just short of Turkey Creek?

A. Correct.

Q. You kind of drew a picture over here, Exhibit 34. I'm showing you what has been admitted as 23 and 12. On Exhibit 12 where your Jeep Cherokee is parked, is

that the turnoff then that you have indicated from Rucker to Kuykendall? If somebody was traveling—

A. From the south.

Q. Let me ask it. If somebody is traveling from the east towards west on Rucker and then hangs a right-hand turn on Kuykendall, the right-hand turn -- it looks like your Jeep Cherokee is parked on the right-hand turn where Kuykendall is. Is that correct?

A. That's right.

Q. That is a little bit of a T-turn there, would you agree, a right turn?

A. Yes.

MS. CABANILLAS: I don't have anything else, Your [81] Honor. Thank you.

THE COURT: Any redirect?

MS. BRAMBL: Just about three questions, Your Honor.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. How many years did you spend living in the Douglas area?

A. Oh, about four years.

Q. And on all of the roads that you traveled, Leslie Canyon, the Rucker Canyon portion, and Kuykendall Cutoff, would you have felt safe driving just a regular,

nonfour-wheel-drive, low clearance vehicle on those roads?

A. Very safe.

Q. Would any of them, in your opinion, have been too rough to drive on—

A. No.

Q. —with a vehicle like that?

A. No.

Q. And the photographs that you took, did they fairly depict the road conditions—I guess my question is: Were there any parts that were really rough that you just didn't take pictures of, or did you try to make a representative showing of what the road looked like?

A. Yes, the photographs I took were of the roughest areas that I found.

MS. BRAMBL: That's all the questions I have.

[82]

THE COURT: Thank you.

Any recross?

MS. CABANILLAS: No, Your Honor. Thank you.

THE COURT: Thank you, sir. You may step down.

Any rebuttal witnesses?

You have another witness?

MS. BRAMBL: I have two more witnesses, Your Honor. I notice the hour.

THE COURT: Yes. I'm sorry. I thought that you were only calling Mr. Chacon. We have to recess at this time. I've got a meeting at 12:00. It is four minutes to 12:00. What we will do is we will reconvene at 1:45. I have a hearing at 3:00, but we will start up again at 1:45. I have a 1:15. We can reconvene at 1:30. We will reconvene at 1:30. We stand at recess until 1:30.

(A recess was taken.)

MS. BRAMBL: Ralph Arvizu.

RALPH ARVIZU, DEFENDANT, SWORN

THE CLERK: Please state your name and spell the last for the record.

THE WITNESS: Ralph R. Arvizu, A-r-v-i-z-u.

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. Of what country are you a citizen?

A. U.S.

[83]

Q. Where do you live?

A. Douglas, Arizona.

Q. How long have you lived there?

A. Basically all my life except for ten years in Phoenix.

Q. And what kind of work do you do?

A. I'm a driver for Animal Health Care Center.

Q. And how long have you been in that occupation?

A. For a year, about a year.

Q. Before that what kind of work did you do?

A. I used to spray pot epoxy in Phoenix, Arizona for about four or five years.

Q. Are you married?

A. Yes.

Q. Do you have children?

A. Four.

Q. How old are they?

A. They are 10, 9, 5, about there, and one is going to be one year.

Q. Did you and your family own a van?

A. Yes.

Q. Earlier this year?

A. Yes, I did.

Q. Can you just briefly tell me the make and model?

A. A 1984 Toyota van, gray.

Q. And how many doors did it have and where were the windows [84] located?

A. Two doors basically, it had windows all over, and had a sliding door on the right for the rest of the passengers to get on, and a door in the back to lift.

Q. And, of course, we are going to be talking about the day of January 19 of this year when you were stopped and arrested by border patrol. How well do you remember the events of that day?

A. Pretty well.

Q. Who was driving the van?

A. I was.

Q. And were you on Leslie Canyon Road?

A. I was on Leslie Canyon Road going north.

Q. From there can you tell me what route you took?

A. I took—after passing Leslie Canyon Road, I took Rucker Canyon Read heading west and proceeded to go to Kuykendall Road north. It is very difficult to pronounce.

Q. Who else was in your car?

A. My sister Julie Arvizu and my nephews, Julisa, Renato, and Guillermo.

Q. And earlier that day had you made some stop in the national forest?

A. We did one stop prior to getting onto Rucker Canyon Road, we were still on Leslie Canyon, just to stretch out for a little while, five minutes. It was

maybe about—I'd say [85] about a mile or two away from Rucker Canyon Road and proceeded on.

Q. And you've had a chance to look at the map—

MS. BRAMBL: May I approach?

THE COURT: Yes, you may.

BY MS. BRAMBL:

Q. —that was marked and admitted as Exhibit 1. You heard the testimony about the route. Would you agree with what you have heard so far about the way your car was traveling, what direction?

A. Yes.

Q. How fast were you going around the time that you saw the border patrol agent?

A. About 20 to 30 miles an hour.

Q. Did you slow down abruptly when you saw him?

A. No, I didn't.

Q. How did you react when you first noticed the border patrol agent?

A. I knew he was there. I was nice and calm. I just was more relaxed, sat towards the steering wheel, and just kept going.

Q. Did you wave at him?

A. I acknowledged he was there. I looked at him, but, no, I did not wave at him.

Q. And do you know whether or not any of the passengers in [86] the car either looked at the agent or waved at him?

A. No, I don't.

Q. Do you recall when you were about to turn from Rucker Canyon onto Kuykendall Road whether or not you used your indicator?

A. Yes.

Q. What do you remember about that?

A. I turned them on when I got real close to the road, maybe about 100 feet, maybe even less, and turned them on and just kept going, did a slight stop just to make sure nobody was coming towards my way on that road I was going to turn on.

Q. So did your car come all the way to a stop, or did you just hesitate and look?

A. Just hesitate and look.

Q. Do you recall whether or not you turned your indicator off at any point during the turn?

A. No.

Q. Was there any noticeable odor of marijuana inside the van?

A. No, there wasn't.

Q. How long after your turn onto Kuykendall Road were you pulled over by border patrol?

A. About a mile or two.

Q. And tell me what happened.

A. When he turned on his lights, I stopped to the side and I [87] waited for him to come up to the window, rolled down the window and I said, "How are you doing?" He asked if I was a U.S. citizen—or everybody in the car was a U.S. citizen. I proceeded to tell him that everybody was a U.S. citizen. And when he was approaching the vehicle, he did have his hand on the gun, his right hand.

Q. Did he take the gun out?

A. No. He just had it near the gun.

Q. Was it on the gun, touching it, or near it?

A. Yes, on the gun. And he—he finished asking me if I was a U.S. citizen. I asked him if he needed any identification, which I was already taking out the identification to show him. He said no. He asked me to take a look around the vehicle. I said okay.

Q. What did you—tell me exactly what he asked.

A. If he could take a look around the vehicle.

Q. What did you understand that to mean?

A. Take a look around the vehicle.

Q. Did you think he would be looking inside?

A. No.

Q. And what happened then?

A. After that he proceeded to go around the front of the vehicle and just looked at everybody and asked me —as he poked his face in by the window, the window was closed, and he just looked in there and he said, "Can you open the door?" I [88] said, "The door doesn't open. It's broken."

So he proceeded to open it himself and opened the door and just looked at everybody and started looking at the bags and started feeling the bags. And once he felt one of the bags he said—he asked me—from right there he asked me—from where he was at he said, "What do you have in there?" I said, "I don't know."

So he went over—before he went over to the front, he asked me to get off the car. And I did get off. And I was going to the front and he goes, "No, go that way." He made me go to the passenger end of the vehicle and he asked me again, "What do you have in the car?" And I said, "I don't know."

So he told me to get down on the floor. I got down on the floor. He handcuffed me. And he went back to check on the bag. He opened one bag up because—I can see his steps as he was going. I can see since I was on the floor. I can see his steps going towards the door and I could just hear the zipper and everything.

And he came back again and said, "Tell me what you have in the car and everything will go real good on you." I said, "I don't know." After that he transferred me into his vehicle—no, no. Sorry. He read me my rights and he asked me if I wanted them in Spanish or English and I said English. Then that is when he transferred me to his vehicle.

Q. At any point did he tell you that you didn't have to let [89] him look inside your car?

A. No, no.

Q. That you could refuse to give consent?

A. No.

Q. And he didn't read you your Miranda warnings before asking to look inside?

A. No.

Q. You said that he had his hand touching his gun when he—

A. Yes.

Q. Asking you whether he could look around. How sure of that are you?

A. Very sure.

Q. Did his hand—throughout that first encounter did his hand remain at his side on the gun?

A. I heard a click on the button and he did just keep it in his holster, but it was unclicked and his hand was positioned in there. He just with his left hand told me to throw myself on this floor which I did.

Q. His hand stayed that way while he was talking to you?

A. Yes.

Q. Did he ever draw his gun, take it out of the holster?

A. No, I don't think he did. I was very nervous at that time so I just listened to what he said.

Q. And you've had a chance before court to look at the photographs that we marked and entered as exhibits? [90]

A. Yes.

Q. Just a couple quick questions about the road conditions.

First of all, the photographs that show the part of the road that you were on, Leslie Canyon, Rucker Canyon, and Kuykendall, did the road when you were on it look the same or different than as it appeared in the photos?

A. They are about the same.

Q. And was there any part of the road that you were driving on that you felt would not have been safe for the van that you were driving to be on?

A. At the speed I was going, it was good. They were good.

MS. BRAMBL: That is all the questions I have.

THE COURT: Ms. Cabanillas.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. Mr. Arvizu, you stated on direct that you lived there in Douglas all your life. Is that right?

A. Basically all my life except for ten years in Phoenix.

Q. And that you were driving a 1984 minivan on this date, January 19?

A. Yes.

Q. And that you were traveling basically the exact route that the agent, Agent Stoddard, said you were traveling?

A. Yes.

Q. You were here in the courtroom when Agent Stoddard [91] testified. Is that correct?

A. Yes.

Q. You went up Leslie Canyon and then you hung that left turn on Rucker and hung the right turn on Kuykendall. Is that right?

A. Yes.

Q. So are you denying today that you had anything to do with those drugs that were found in your vehicle?

MS. BRAMBL: Objection. That is outside the scope of the purpose of this hearing.

THE COURT: Sustained.

MS. CABANILLAS: Your Honor, on that point I believe it goes to the credibility of this particular defendant.

THE COURT: Sustained.

BY MS. CABANILLAS:

Q. You stated that there was no noticeable odor of marijuana in the interior of the vehicle. Is that correct?

A. Yes.

Q. When the agent said there was an odor, you would differ on that point?

A. Yes.

Q. When the agent walked up to you and talked to you initially, where were you? What were you doing?

A. When he talked to me, when he walked up, I was on the passenger side—I mean on the driver's side.
[92]
Q. When you were on the driver's side, are you seated in your car?

A. Yes.

Q. You are—then is your door opened or closed?

A. Closed.

Q. The door was closed?

A. Yes. I didn't open no window until he got there.

Q. And when you did open the window—when he did approach your window, did you open your window?

A. Yes.

Q. You stated that the agent walked around—let me clarify. The agent spoke to you and then he asked you for consent to search the car?

A. To take a look around the vehicle.

Q. You stated that you did not then give him consent to look around or look in the car?

A. To look in, no. He came in himself.

Q. And when the agent then—when you are saying that he then walked around to the passenger side, is that what happened after that exchange?

A. No.

Q. What did he do?

A. He automatically told me to open the door on the side and I told him, "It doesn't work."

Q. Which door on the side are you referring to?
[93]
A. The sliding door.

Q. The sliding door, is that on the passenger side or the driver's side?

A. Passenger. He opened it.

Q. He opened it?

A. Yes.

Q. When he did that, did you say anything?

A. No.

Q. When he—there is part of the testimony—I believe I heard you on direct, you said that—the window on the passenger side, was that up or down?

A. They were up.

Q. Do you remember on direct that you stated that the officer poked his head in that window?

A. He didn't poke his head in there. He just was looking like that.

Q. So he never poked his head in the interior of the vehicle at all?

A. No.

Q. And when—I mean at all. That is, before he had that conversation with you relating to consent, he had not poked his head in the interior of the vehicle?

A. When I had my window rolled down, he was like this talking to me.

Q. So his head was outside the vehicle?
[94]
A. Yes.

Q. Is it your testimony then that you were out of the car and handcuffed before the officer discovered the marijuana?

A. I was on the floor, yes, and handcuffed.

Q. The duffel bag that contained the marijuana, is that your duffel bag?

A. No.

Q. So when you stated that you don't know what is in the duffel bag, whose duffel bag is it?

MS. BRAMBL: Object again on the ground of relevance and scope of the examination.

THE COURT: No, overruled, to explain the answer he gave earlier.

BY MS. CABANILLAS:

Q. The duffel bag you are referring to that contained the marijuana, whose duffel bag was that?

A. Whoever had loaded it on. I wouldn't know whose actually it was.

Q. So when you took control of this minivan, where did you take control of it?

MS. BRAMBL: Object again, Your Honor. This exceeds the scope of direct and the scope of the hearing.

THE COURT: It does seem to go beyond where the direct went, Ms. Cabanillas. I don't know that that has any bearing on the stop in this case.
[95]

MS. CABANILLAS: It also has control and bearing on the issue of standing if the defendant is denying knowledge of the drugs as well as the car.

THE COURT: He's in the vehicle. He's got standing. He's the driver of the vehicle and the drugs are found in the vehicle. He has got standing.

MS. CABANILLAS: As far as the actual drugs himself, if he is disavowing knowledge of the drugs, Your Honor. I would disagree on that point if I can explore it.

MS. BRAMBL: Your Honor, whether he knew the drugs were there or not is not what this hearing is about. That is the trial. It seems like those issues should be addressed then.

THE COURT: I don't think we need any testimony regarding standing. I think clearly if he is driving it and he gets stopped he has standing to object to the stop of the vehicle.

BY MS. CABANILLAS:

Q. As far as the duffel bag that was in your vehicle —where did you say you were going that day, what you were doing in the 1984 minivan?

A. I was going to Turkey Creek.

Q. What were you going to be doing in Turkey Creek?

A. Going to meet up with a gentleman.

Q. Who was this gentleman?

[96]

MS. BRAMBL: I would object again, Your Honor.

THE COURT: Overruled. It has to do with why he was out there.

BY MS. CABANILLAS:

Q. Who was the gentleman?

A. I don't personally know him. I was just supposed to meet a person in a Ford toolbox pickup. I was supposed to meet there.

Q. What was that about the toolbox?

A. Black toolbox is the description he gave me.

Q. You were going to meet this guy who you didn't know in the middle of Turkey Creek?

A. Didn't know.

Q. Do you recall when you were first placed on pretrial release in this case? Do you remember that? You were in custody and then put on pretrial release. Do you remember that?

A. Yes.

Q. And as part of your conditions of pretrial release, wasn't it true you weren't supposed to take any illegal drugs?

A. Yes.

Q. And isn't it true that—

MS. BRAMBL: Your Honor, excuse me. I object to the question that is about to be asked, which is whether or not he used any illegal drugs while he was on pretrial release. I [97] don't think that is relevant. It is certainly not any of the enumerated impeachment grounds. There is nothing to indicate that he was using any kind of illegal drugs on the date in question.

THE COURT: Well, if he violated a court order, doesn't that go to his credibility?

MS. CABANILLAS: That is the reason it is being offered.

THE COURT: Ms. Brambl.

MS. BRAMBL: I agree. It is improper impeachment and I still object.

THE COURT: Overruled.

BY MS. CABANILLAS:

Q. So when you were placed on pretrial release, didn't you promise the court you wouldn't use any illegal drugs while you were on pretrial release?

A. Yes.

Q. Isn't it true that you did use illegal drugs?

A. Yes.

Q. Didn't you take an avowal in front of the court today that you were going to tell the truth on everything?

A. Yes.

MS. CABANILLAS: I don't have anything else, Your Honor.

THE COURT: Any redirect?

[98] MS. BRAMBL: Just a question or two.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. Have you told the truth today?

A. Yes.

Q. The oath that you took, what did it mean to you?

A. To tell the truth.

Q. Did you ever deny to pretrial services—

A. No.

Q. —or anyone—

A. No, I didn't.

Q. Out of all of the things that you have testified about today, how sure are you?

A. Very sure.

MS. BRAMBL: That is all the questions I have.

THE COURT: Thank you. You may step down, sir. Call your next witness.

MS. BRAMBL: Julie Reyes. May I get her from the hallway?

JULIE REYES, DEFENSE WITNESS, SWORN

THE CLERK: Please state your full name and spell the last for the record.

THE WITNESS: My name is Julie Reyes. R-e-y-e-s.

[99]

DIRECT EXAMINATION

BY MS. BRAMBL:

Q. What country are you a citizen?

A. Douglas, Arizona.

Q. That is where you were born?

A. Yes, ma'am.

Q. And how are you related to Ralph?

A. He's my brother.

Q. And where do you live?

A. In Tucson, Arizona.

Q. Do you have children?

A. Yes, five.

Q. How old are they?

A. I have two girls, 12 and 10, and I have three boys, 7 and two years old, twins.

Q. And about how often do you see Ralph and his family on average?

A. Once or twice a year.

Q. How was it that you came to be a passenger in the van that Ralph was driving earlier in January?

A. I needed a ride to Tucson because my car didn't start. So I was at my mom's house and he came in and my mom had told him that my car didn't start.

Q. So he offered you a ride?

A. Yes.

[100]

Q. And that was from Douglas to Tucson?

A. Yes, ma'am.

Q. And where were you sitting in the van?

A. On the passenger side.

Q. And who was driving?

A. Ralph.

Q. And where were the kids?

A. In back.

Q. Were all of your kids with you or just some of them?

A. Some of them.

Q. And did you notice anything unusual about the way your children were sitting in the car or in the van?

A. No, because I was—I went to go get my purse. My brother helped me with my bags. He put them inside the car. What happened, I came out, and when I came outside, he had shut the door and I went in front.

Q. And I want to turn to just the stretch of road that you were on starting at Leslie Canyon and up to Rucker Canyon and the turn on Kuykendall Road right before border patrol stopped the car.

Can you tell us what the road conditions were like? How did the road seem? Was it very bumpy or average?

A. It was average. It was a dirt road.

Q. Did this seem like a dangerous road to you?

A. No.

[101]

Q. Were you worried about the van being on a road like that?

A. No.

Q. Was there ever a point in time where Ralph hit the brakes and slowed down a great deal from the speed he was traveling?

A. No.

Q. Do you know about how fast Ralph was traveling?

A. Less than 30.

Q. Did you notice the border patrol agent before he pulled you over?

A. Yes. When we were coming, he was coming too in front of us, and he went to the side and then it was when we went and then we passed.

Q. Did you notice any change in Ralph or anyone else in the car, the way they were acting, after they saw the border patrol agent?

A. No, I didn't.

Q. Did you wave or look at the agent?

A. No.

Q. Tell us what happened when the agent pulled Ralph over?

A. Okay. He asked Ralph if we were U.S. citizens. He said yes.

Q. Let me back up. Where did the agent go to ask that?

A. When he stopped—when he turned and he stopped us, like a few minutes in front more.

Q. Which side of the car did he go up to, your side or [102] Ralph's side?

A. Ralph's side. It was on Ralph's side.

Q. You said he asked if you were U.S. citizens. Who answered?

A. My brother.

Q. What did you guys tell him?

A. Yes, we were all U.S. citizens.

Q. And what happened after that?

A. He asked us if—he asked Ralph if he could look around. Ralph said yes.

Q. And what happened after that?

A. He went around and my brother said that it didn't open and then he opened the door and he asked my kids if they were U.S. citizens and they said yes. He took off a bag from the back and he asked Ralph what he had in there and my brother said, "Take a look." Then when

he told me—he told me and my brother, "Hands up. Don't move." He had his hands on his waist and then he gave a turn and that is when he handcuffed Ralph.

Q. You said his hands were on his waist. Did you see whether or not his hand was near or on his gun?

A. It looked like he was touching it.

Q. Did you see whether or not his hand was touching his gun when he went up to Ralph's window?

A. When he went back?
[103]
Q. When he first came up to the car, could you see?

A. No, I couldn't see that.

Q. So only when he walked around the other side you could see?

A. Yes.

Q. Was there an odor of marijuana inside the van while you were there?

A. I didn't smell none.

MS. BRAMBL: That is all the questions I have.

THE COURT: Ms. Cabanillas.

CROSS-EXAMINATION

BY MS. CABANILLAS:

Q. You stated that you are the defendant's sister. Is that right?

A. Yes, ma'am.

Q. Do you care about him a lot?

A. Well, he's my brother.

Q. Probably wouldn't like to see him get in trouble. Would you agree with that?

A. Well, if—I care for him, let me tell you that. That is true.

Q. I understand. You stated that the children that were in the car were your children?

A. Yes, ma'am.

Q. How old were they?
[104]
A. 12, 10 and 7.

Q. 12, 10 and 7?

A. Uh-huh.

Q. The two children that were in the back whose feet were on top of the black duffel bag that had marijuana in it, which children were those?

A. I don't know.

Q. You don't remember?

A. No, because I'm not the one that shut the door. My brother was the one.

Q. Your brother shut the door. You stated that he was the one who, did you say, brought your luggage into the car? Is that right?

A. My bags.

Q. Your bags. Was the black duffel bag a bag that you knew about?

A. No.

Q. So where did that come from?

A. I don't know.

MS. BRAMBL: Object, Your Honor. It has just been asked and answered that she didn't know.

THE COURT: Overruled.

BY MS. CABANILLAS:

Q. Where did that black duffel bag come from?

A. I don't know. I didn't see no bag. My brother took the [105] bags in.

Q. So if—

A. He helped me put the bag in.

Q. If you don't know anything about the black duffel bag, was it the children's duffel bag?

A. I didn't see nothing.

Q. So if there is anybody that knows anything about that duffel bag, would it be your brother then?

A. I don't know. I can't say because I didn't see nothing.

Q. You stated that your brother was—you say he was giving you a ride from Douglas to Tucson. Is that right?

A. Yes.

Q. Where were you going in Tucson?

A. To my house.

Q. To your house. Isn't 191 the highway that leads from Douglas to I-10 which will then shoot you right up to Tucson?

A. Well—

Q. Is that true? Doesn't that route take you to Tucson, paved roads the whole way, I-91 straight up?

A. I don't know.

Q. You don't know. Have you lived in Douglas for a while?

A. Yes.

Q. How long?

A. Since I was born until I was like 23.

Q. So 23 years you lived in Douglas and you are just not [106] real sure about whether or not 191 leads to I-10 to take you to Tucson, quickest route?

A. No.

Q. Not sure?

A. The only thing I know is that Bisbee and other places, but my thing was that I didn't want my kids to miss school and I had a ride and I went with him.

Q. I notice that you said the agent appeared to be touching his gun. Where were you sitting?

A. I was on the passenger side.

Q. And when you say the agent appeared to be touching his gun, where was that, when the agent was on the driver's side?

A. No, when he was on my side.

Q. So when he was on your side, that was after the time that he had spoken to Ralph. Isn't that right?

A. Well, it was when he got the bag down and then it was when he went around.

Q. So when he went around to the side where you are at, that is when you saw that he may have had his hand on his gun. Is that what you said?

A. I saw him with his hand on his waist.

Q. On his waist, but you don't know whether it was on the gun or not?

A. Well, that is when he said, "Don't move. Stay still."

Q. When he said, "Don't move. Stay still," was that after [107] he found all the marijuana in the duffel bag?

A. Well, he didn't open it. He asked Ralph and then he went to Ralph and then he handcuffed Ralph and that is what happened.

Q. So is it your testimony then that Ralph was handcuffed before the agent found the marijuana?

A. Well, he didn't open the bag in that time.

Q. You are testifying he didn't open the bag of marijuana, the duffel bag that contained the marijuana?

A. Until he came back.

Q. When you are sitting on the passenger side and you stated that you saw Agent Stoddard talk to your brother, that was when Agent Stoddard was on the driver's side. Isn't that right?

A. What is that?

Q. Sure. I will repeat that.

When you are in the passenger seat and you are seated in the passenger seat, I think you testified that you noticed how the agent walked up to Ralph, your brother, and asked him a few questions initially. Do you remember that?

A. What do you mean?

Q. That is okay. Right after the stop, when the car was stopped, you are in the passenger seat, and do you see the agent walk up to your brother after the stop?

A. Yes, he did.
[108]
Q. Agent is talking to your brother?

A. Uh-huh.

Q. And can you see the agent at all from where you are standing—from where you are sitting, excuse me, when you are seated in the passenger seat?

A. Just his face.

Q. It's been about, let's see, February, March, April, May, June, July, August. I notice that you stated that you knew precisely what the agent stated, what you believed he asked, "Ralph, do you mind if I look around?" Do you remember that phase [*sic*]?

A. Uh-huh.

Q. Then you also noticed about the touching of the gun. Were you in the courtroom today when your brother testified? Were you in the courtroom just now when your brother testified?

A. Yes—no, not in here, no, outside.

Q. Have you spoken to your brother at all between the time of the stop and today? Have you had a chance to speak with him before you get up on the stand?

A. No.

Q. You haven't spoken to him at all about January to what is going on, almost a year, you haven't spoken to your brother once?

A. No.
[109]
Q. Not once. Not on the phone?

(Witness indicated.)

MS. CABANILLAS: I have nothing else. Thank you, Your Honor.

THE COURT: Any redirect?

MS. BRAMBL: Just a couple more.

REDIRECT EXAMINATION

BY MS. BRAMBL:

Q. Just to clarify the questions about what you saw, whether or not Agent Stoddard was touching his gun. You could not see anything but his face when he was on the driver's side of the car first talking to your brother, right? So you don't know whether he had his hand on the gun or not?

A. Uh-huh.

Q. When did you see him with his hand touching the gun?

A. It was when he went to the passenger side.

Q. To your side of the car?

A. Yes, ma'am.

Q. And how sure are you that his hand was actually touching the gun?

A. Because he had it on his waist. When he pulled it back, he put his hands on the waist and he said, "Don't move put your hands up," and, you know, I got scared

because, you know, when I heard that, and then for him to put his hand right there, so what is going on?
[110]

Q. When you say his hand was on his waist, was it just on his waist or also touching his gun? What do you remember on that?

A. It looked like half, half on his gun.

Q. So his hand was partly touching his gun?

A. Uh-huh.

Q. Did he ever take it out of the holster?

A. No, not that I remember.

Q. And you said that you haven't talked to your brother. Do you mean you haven't talked to him about the case or you haven't had any contact with him at all over the last—

MS. CABANILLAS: That has been asked and answered.

THE COURT: Overruled.

THE WITNESS: I haven't talked to him about this, but—

BY MS. BRAMBL

Q. Have you talked to him about other family things?

A. Well, yeah.

Q. So you have had contact with him since the arrest?

A. Yes, when we are at my mom's house.

Q. Would you tell lies for your brother?

A. No.

Q. Have you told the truth in court today?

A. Yes, ma'am, I have.

MS. BRAMBL: That is all the questions I have.
[111]

THE COURT: Thank you, ma'am. You may be excused.

Call your next witness.

MS. BRAMBL: We don't have anymore, Your Honor.

THE COURT: Does the government have any other witnesses?

MS. CABANILLAS: No, Your Honor. Thank you.

THE COURT: Counsel wish to argue?

MS. BRAMBL: Yes, Your Honor.

Your Honor, Agent Stoddard did not have a reasonable suspicion to stop. And the consent that was given, it was both involuntary and it was tainted by the illegal stop.

Just looking at the factors involved that we heard testimony about today, it sounds like a laundry list of factors, but when you look at each one, which I'm

about to do, there is really nothing to separate Mr. Arvizu and his vehicle from a law-abiding citizen.

Every one of the factors cited is basically—you couldn't separate it from innocent behavior. I will start with the driving.

There were two areas that were testified to. One was that when he first saw the agent that he slowed down by about half. The agent admitted that he really couldn't say how fast he was going either before or after that. This was a rural area. Just about all of the cases when you look at them, if no traffic laws were violated or no traffic [112] disturbance was created, that is pretty much not a factor that could be considered to support a stop. I think we have that situation here.

We don't have any testimony that he violated traffic laws, that he was driving dangerously, or causing problems for other drivers.

It is not the lane change but the turn that was the other driving indicated. He claims that—Agent Stoddard claims that Mr. Arvizu made an abrupt turn onto Kuykendall Road. However, the agent also claimed—and this is somewhat contradictory—that he had his indicator on for hundreds of yards beforehand, way too early.

As you heard from the testimony, that is somewhat disputed because Mr. Arvizu says that he had it on what he considered a normal amount of time. However, certainly Mr. Arvizu signaled ahead of time.

You saw and heard testimony both from the agent and Mr. Chacon the nature of the intersection. It is kind of a T. There was nothing abnormal or wrong with that driving.

Certainly, again, no dangerous driving or obstructing traffic. No traffic laws were violated. Agent Stoddard admitted he wasn't making a traffic stop or making a stop because of traffic.

The registration of the car turned out to Leticia Arvizu at 403 4th Street in Douglas. Both the name and [113] address were legitimate. There is nothing to show that either the registered owner or the address had ever before been involved in any kind of illegal activity. It didn't come up as a hit.

The only thing the agent can say is that that whole region is basically bad in Douglas, which certainly is not fair or is not appropriate for all the law-abiding citizens who would live there. Just because you live on a street in a neighborhood where things happen doesn't make you a lawbreaker.

The vehicle wasn't stolen. There were basically no problems with it. It had valid Arizona plates. So it is not like it had a Sonoran plate or a drive-out sticker or some indication that will sometimes cause agents to be suspicious.

The shift change and the checkpoint evasion claims I think are also unfounded. This was 45 minutes ahead of time from the shift change so I guess we are talking about three hours a day when it wouldn't be all right to be driving on the road because there are three shift changes.

And the agent also admitted that agents may drive back along Leslie Canyon Road so the argument doesn't make sense because, if they are heading back, they will be heading back from any direction. It is not like they follow a set route.

The same thing with the checkpoint evasion argument. [114] That is, they are presuming everyone that doesn't live there has no business to be on that road unless they are evading a checkpoint. We don't even have any testimony about how long that checkpoint had been active or whether or not people generally know that.

We've had a lot of testimony about all of the different residences and ranches along the area, Rucker Canyon, and everyone agreed it is a popular recreation spot. There are a lot of valid law-abiding reasons why a person could be on that road. It is not restricted in any way.

The fact that it was 2:45 on a weekend holiday afternoon is also—there is basically nothing about the time or location to create a reasonable suspicion.

The factors that have been listed about whether Ralph and the passenger looked nervous, whether they acknowledged or waved at him, it is almost as if people can't do anything right as far as border patrol is concerned.

Here we have the situation where the border patrol agent claims when the passenger and Mr. Arvizu didn't wave that is very unusual, that was something in the bad character. Yet when the children wave, he says that is bad too because that didn't look normal.

I think there are several cases where not looking at the agent, looking stiff or rigid, those kinds of things, are just not enough, even in combination with other factors, [115] unless you have something to take it out of the ordinary, to distinguish Mr. Arvizu from other people.

The fact that the children's knees were slightly elevated. This isn't a situation where their knees are real high up around their shoulders or chest level. He says they are basically about level with the seat. Certainly people who are picnicking or camp have items and there is nothing suspicious about that even in consort with the other factors.

The road—when you look at the photographs and you hear the testimony, all three of the roads that could be referred to in this case, Leslie Canyon, the stretch of Rucker Canyon, and Kuykendall Cutoff, the roads are good roads. They perhaps would be muddy in the event of rain, but they are certainly not four-wheel-drive-only roads. No testimony they had to have a four-wheel drive or restricted or that a four-wheel drive—there were not even any signs recommending it. They are rural, dirt roads, but certainly not unsafe or inappropriate to have a two-wheel-drive car on.

The other factor that was listed, the prior—or other experience of Agent Finley, that really doesn't have anything to do with this case at all. Agent Stoddard admitted that there is no connection between the van that was observed in this—in that instance with Agent Finley and the van in this case.

In fact, he believed that other van had been and its [116] occupants had been apprehended. So those incidents are completely unconnected. There was no testimony to show any nexus in time. We don't know whether this happened the week before Mr. Arvizu's arrest or two years before.

Certainly there is nothing to rely on. This factor would basically mean that all minivans on Leslie Canyon Road should be subjected to a stop.

The odor of marijuana that was mentioned, that is not even a factor. I believe that shouldn't be considered by the court, even if you believe that the agent did detect it, because through the agent's own testimony, he would not have detected that odor of marijuana until he entered the van which would have been after the stop and after the consent had been given.

There are a lot of things missing that you would expect to see in a case like this. There isn't much of a proximity to the border. That is 34 miles away. Basically there is just nothing to separate out Mr. Arvizu and the van from anyone else engaging in normal ordinary conduct. In short, no particularized suspicion that this car or driver was doing anything wrong.

I just wanted to comment on three cases. I think they have already been referred to in the motions.

One is *U.S. v. Hernandez-Alvarado*, 891 F.2d 1414. That was a case where there was not reasonable suspicion. The [117] Ninth Circuit found there the driver had slowed down noticeably when a police vehicle approached. His residence was in a neighborhood right on the Mexican border which was under investigation for narcotics activity. The car had a large trunk. Both the driver and passenger appeared nervous. The factor that wasn't involved here was the two-way antenna on the car.

The Ninth Circuit found that a combination of those factors was not enough to create a reasonable suspicion.

Another case where the Ninth Circuit did find reasonable suspicion was *U.S. v. Rodriguez-Sanchez*, 23 F.3d 1488. I think that case is distinguishable from this case because there, there was an abrupt lane change, but it actually involved dangerous driving that created a traffic hazard for other people. There the car abruptly exited the interstate.

It sounds like it was a busy California freeway and basically when it spotted whatever law enforcement behind it, it made an abrupt exit. It crossed two lanes of traffic without looking for other vehicles and it actually cut off two cars that were traveling in the other lanes. Basically it made a very fast and dangerous maneuver across two lanes of traffic to leave the interstate, and certainly nothing like that happened here.

In fact, that case characterized the driving as an [118] evasive maneuver. Here Ralph was actually signalling too much, if you believe the agent's testimony that he was signalling for hundreds of yards. So the opposite of evasive.

Then I would also compare *U.S. v. Robert L.*, 874 5 F.2d 701. The Ninth Circuit found no reasonable suspicion. There the driver wouldn't make eye contact with the law enforcement officer. He swerved to avoid the officer into another lane but without traffic. He was driving in tandem with another car and his vehicle contained a large trunk.

Here we have Mr. Arvizu driving; certainly in a rural area, but it is certainly not in the middle of nowhere with no reason to be there. There is a national monument close by, ranches, houses, picnic areas, and

in fact he was very close to the Rucker Canyon Road turnoff.

As I pointed out before, this was a weekend at 2:15 in the afternoon.

Turning briefly to the consent issues, I almost think with the bad stop that we don't have to reach those. But I think there are two reasons why any consent given was invalid.

That would be—the first would be that the consent was involuntary and I would look to *Chon-Jimenez*. I didn't write down the cite. I think it is in the motion that I filed.

That case looks at five factors. I think that, and [119] there is no magic number. I think the court has to weigh those. I think that out of the five factors that we have four of them and that therefore the consent was involuntary.

Whether or not he was in custody, certainly any reasonable person in Mr. Arvizu's shoes would not have felt free to leave. I think it was clear that he was being detained and was in custody.

Whether or not the weapon was drawn, this is a factor in dispute. No one says the weapon was drawn. But he did have—the agent had his hand on the gun. The agent actually doesn't remember, if I am remembering his testimony correctly. He stated normal practice would not be to either unholster his gun or touch it, but he didn't recall whether he had done those things in this case.

You just have to look at the testimony of Mr. Arvizu and his sister. Their testimony seemed well remembered and believable. Mr. Arvizu stated that

when the agent first approached him he had his hand on the gun and that he vividly remembered hearing the button click so the agent would have it accessible.

Julie Reyes testified she didn't see it at first at the other side of the car, a factor which bolsters her credibility because she could only see the agent's face through the window. When he did walk around, she saw his hand on his waist touching his gun. So I think that factor is [120] satisfied.

I think it is undisputed that he was not read his Miranda warnings before being asked whether or not they could look inside the vehicle. And he was—again, it is undisputed he was not informed of his right to consent—of his right to refuse consent to search.

So those last two factors I think would have to be undisputed.

The final factor, I would concede, does not apply, in that there is no evidence that he was told that if he didn't consent a search warrant would be obtained.

I think when you look at and weigh all of those factors that the consent, if it was given, was involuntary.

I would also note that the question and the answer were not clear, but there is certainly evidence that even if Mr. Arvizu gave some sort of consent that he thought he was consenting to just a search around the vehicle and not inside it.

Finally, any consent given would also be tainted by the prior illegal stop. There is four factors that are looked at there. I don't think—I think I cited the case in my motion.

The four factors there are Miranda, temporal proximity, intervening circumstances, and the purpose and flagrancy of the misconduct. I think we satisfy all four of those [121] conditions that the consent would be tainted by the prior illegal stop.

Mr. Arvizu was not Mirandized before giving consent.

As far as temporal proximity of the arrest and consent, one occurred immediately after the other so there is no gap. There is certainly no intervening circumstances.

And the stop appears to have been clearly illegal and not based on reasonable suspicion.

For all these reasons, Your Honor, I'm asking that you suppress the marijuana in this case.

THE COURT: Thank you.

Ms. Cabanillas.

MS. CABANILLAS: Thank you, Your Honor.

The first thing—the hurdle the court needs to get past would be a question of who to believe.

Agent Stoddard testified this morning and then we heard from Mr. Chacon, which I believe his testimony basically. I mean, Ms. Brambl mentioned the things that shows the significance of his testimony, which is basically setting forth the landscape and stuff like that.

If you compare Agent Stoddard with the defendant and his sister, I would submit to you that the court really has no conclusion other than Agent

Stoddard—where they conflict Agent Stoddard should be believed.

Ms. Brambl stated that the sister's—or the [122] defendant's testimony was well remembered. I submit to you it was well rehearsed.

The sister, as Your Honor saw a few minutes ago, when I asked her on cross-examination "Have you ever spoken to the defendant, not even over the last year, not even a phone call?" and she says, "No, no, no," and then when Ms. Brambl gets up, the friendly face representing her brother, then we hear that she not only has spoken to him but she—her brother, but she has also been with the family and all this sort of stuff.

What that boils down to that she is not to be believed and she corroborates what the defendant says happened here. Then really what the defendant says happened here didn't happen. Especially when it comes to those conflicting statements about consent. That is when I think the credibility issue really comes to bear.

Starting then with the proposition that Agent Stoddard's testimony was the credible testimony in front of Your Honor, there is enough to show reasonable suspicion to stop.

I would also note for the record, though, that I would submit the defendant has no standing to challenge the search of the duffel bag. Whether or not he has standing to challenge the stop of the vehicle as a nonowner driver, I will leave that to Your Honor.

[123]

But to the bag he disavowed knowledge. His sister disavowed knowledge. I submit to you in order to be able to challenge the search of an item, you have to

have an expectation of privacy in the item, and nothing the defendant stated demonstrated, and it is his burden to demonstrate, that he has standing.

Then I would submit the marijuana is admissible because the defendant's disavowed knowledge of it and has no standing to challenge the acquisition of it.

Second, though, even if the court was to find the defendant had standing to search the bag—excuse me—to challenge the stop of the vehicle and search the bag, the first step, as Ms. Brambl has noted, is we have to have reasonable suspicion and the officer had to have reasonable suspicion to stop the car.

And I've cited some law in my pleadings I filed. I'm referring to my response to the motion to suppress evidence that was filed on September 11.

And the first thing to note of course is the requirement by the United States Supreme Court that all the factors be viewed together. I think it is real important to keep that in mind because Ms. Brambl was attacking each factor independently and trying to chuck out each factor why it shouldn't be relied upon or not a legitimate factor.

What we need to do is review the evidence in light [124] of the officer's experience and training, in the light of an experienced officer and through the eyes of an experienced officer. And when viewed that way the evidence is sufficient to establish that the officer had reasonable suspicion to stop this car.

The location is very important or significant. There are some factors that are cited in the government's pleadings and I won't belabor all of the factors. What I mean by that is the legal standards set forth on

page 5, looking at what is it about a vehicle or the area that can justify a stop.

We have got characteristics, proximity, patterns, and time of day, previous alien smuggling in the area, behavior of the drivers, appearance, and then model and appearance of the vehicle, and officer experience.

If you look at all that and add it up, the equation adds to reasonable suspicion.

The area in this case—and even Mr. Chacon conceded that it is a remote area. These roads are dirt roads. They are back roads. The quickest route—and, again, you have differing testimony here. I don't think Mr. Chacon conflicted with Agent Stoddard as much as just indicating he didn't know.

But the quickest route from Douglas to north, and if you go by what the defendant and sister say, between Douglas [125] to visit there or go home in Tucson, then the quickest route would be I-91. The unfortunate thing in transporting drugs would be there is a checkpoint at I-91 and Rucker Canyon.

Anybody who goes north from Douglas to the city, being Tucson, or any other city off I-10, they would have to pass through that checkpoint. That is what makes this significant is the fact that checkpoint is operational that day.

You heard Agent Stoddard testify that because the checkpoint is operational they have roving patrols in those back woods area that are normally used to circumvent the checkpoint.

You heard the agent testify the exact route this particular defendant took—and the defendant

himself agreed that he took this route—Leslie Canyon north, getting to Rucker Canyon, hanging that left. Again, the sensor activity corroborated the defendant's route of travel. And that if somebody was to circumvent the checkpoint, they would do exactly the route the defendant took in this case.

And that is a significant factor not undermined at all by the fact that the Coronado National Forest is to the east. The reason that is not undermined is because the second sensor indicated the car had come north, Leslie Canyon, and hung a left on Rucker Canyon, which was away from the forest.

The picnic areas you heard referred to are to Rucker [126] Canyon to the east and that is not the direction of the car.

Again, all of these are pretty fact specific. In this particular circumstance, it was evident that the vehicle had not come from the national forest. The Hunt Canyon Road that is down south there, the testimony was that that is not a picnic ground type place.

So, again, you have the defendant saying he went Leslie Canyon north and the agent saying that and that is confirmed. What made this significant again is the fact the defendant takes that turn on Kuykendall and that is the route that somebody would take to successfully circumvent the checkpoint.

I-181 I believe that is running east to west on Turkey Creek. As I am referring, I am looking at government's Exhibit 40. It is either 40 or 41, whichever is the 8 1/2 by 11.

As you can see, the Kuykendall Cutoff Road would then take somebody successfully past the checkpoint that is operational on I-191 and Rucker Canyon.

I submit to you that the agent is entitled to rely on his knowledge of that area. There has been prior apprehensions in that area. Agent Finley's information given to Agent Stoddard. The fact that he may or may not have made the apprehension of that vehicle doesn't undermine the fact that that confirms that minivans are used to transport drugs [127] and also that that confirms the fact that that area is indeed used as a route to circumvent checkpoints or to at least take a route up and is used by drug dealers.

The factors then which the agent saw when he started going on Rucker Canyon Road. We have the timing of the sensor activity, and the agent is able to say that—based on his knowledge of the area and the timing, he was able to say this vehicle that he saw was indeed the one that tripped the sensors. That is significant. I have cited case law about that.

The agent—the defense makes it sound like this is some rollicking playground and a bunch of people biking and traveling around. The bottom line: the agent said he has to wait for hours before a car goes by, even though there may be ranchers in the area. That is the kind of area it is. It is remote. There isn't a lot of activity. And that is the reason that sensor activity is so significant.

When the agent saw the car come toward him, it slowed down, reduced its speed dramatically, in half.

Again, any differing on any of these facts as I present them, or Agent Stoddard testified to, more im-

portantly, I would submit to you the agent is more credible than the defendant and his sister.

The car decreased dramatically his speed in half. A severe decrease in speed, again based on case law cited in the [128] pleadings, is a factor that can be considered.

These are all factors that can be considered and all together add up to reasonable suspicion. You just can't chuck one out and keep one and chuck the other out and keep the other. It has to be all viewed in totality.

The car decreases its speed. When the van passes by, the driver gets really rigid and stares forward. I recognize the law of the Ninth Circuit saying failure to look or looking is not a factor of reasonable suspicion analysis. I submit that is fine. Without it there is ample reasonable suspicion. But I do believe that it is a legitimate factor to consider, the defendant's demeanor.

If his demeanor is where he gets rigid and seems nervous, that is a legitimate factor, and the agent was proper—or acted properly in relying upon it.

He saw the children in the very back. Their feet were up on something. The agent acted out on the stand exactly where sort of the kids' feet were. It looked as if the feet were in the passenger—or in the foot rest area, but they couldn't put their feet down like somebody—like there was something there.

That was corroborated obviously at the very end when the officer discovered the marijuana and the duffel bag was sitting there right underneath the children. I recognize that post-stop facts are not going to be considered into a pre-stop [129] scenario, but it

does confirm and corroborate at least the credibility of this agent when he stated that he saw the children's feet on something.

After the agent saw the children's feet, then he starts to follow the car. When he follows the car, he noticed the blinker go on by the defendant and then come off and then come on again and he takes this turn. I believe the agent described it as an abrupt turn. Erratic driving again is another factor. The agent can see. He was not stopped for a traffic violation. Still it is a legitimate factor. After, the agent followed the car on Rucker Canyon—excuse me—on Kuykendall Road.

Then we have the use of minivans on a dirt road and it is rugged terrain. Sure it is possible for a minivan to ride these roads. But is it common? Is it likely? Does it help with the reasonable suspicion analysis to note that sedans don't normally drive these roads?

Yes, it is significant, and I submit to you the fact that Kuykendall Road is not only the last route to circumvent the checkpoint but is also a rough road being driven by a minivan is also significant.

The agent ran the registration. The fact this came back to that location by Douglas, the agent had specific knowledge of that area being a high concentration area for illegal smuggling, that again heightened his suspicion.

[130]

Is this reasonable it all boils down to. Is it reasonable for the agent at that point, considering all the evidence, all the factors, to stop the car? I submit to you yes, it was lawful.

After that the agent walked up to the driver and I submit to you the consent that was—that the marijuana is admissible for several reasons. We have consent. And I submit again that when the agent says he asked, "May I search the car?" or whatever it is that the agent said on the stand, I think he said, "Can I look in your car to search it?" I think may have been what he said, the defendant said yes.

What you have also is how does this corroborate what the agent said. Well, the agent walks around and he opens up the door, or there may have been an interchange in there about can this door open, can it not. There was a question about that. But the consent was given when the agent spoke to the driver. I would submit to you that you go by what Agent Stoddard said and not by what the defendant said because, again, there is a credibility issue here.

The agent stated that he didn't have his hand on his gun during this exchange. Again, I submit to you that the defendant and his sister differing on that point is a question of credibility. Even if it was possible that he did, that would not undermine the consent because the consent can be freely given otherwise.

[131]

Defense stated that he was not told of his right to refuse consent. Well, there is a U.S. Supreme Court case, and I want to say it is *Pennsylvania* v. *Labron*, or *Maryland* v. *Wilson*, one of those two. I may file something on that point. You don't have to tell somebody about their right to consent. It also isn't required that Miranda be given before consent is given. Certainly that makes sense because he was only detained at that point and not arrested.

After the agent received consent, he opens the door and smells marijuana. At that point he can still go and find out marijuana on that consent, but, if not, he also has probable cause at that point because once he smells marijuana and the odor of marijuana, he has probable cause to search the vehicle and that would include all the containers in the vehicle.

I would also note that—I think there is a Ninth Circuit case called *U.S.* v. *Mines*, and that particular case the defendant—there was an issue about whether or not the agent had asked for permission to search the car, and the defendant made, very much like this defendant, an argument that he just consented to look in the car and not to search the car and the court noted that if the defendant just stood by while the agent looked in places and didn't say anything and didn't object that that is circumstantial evidence of the consent to enter the car.

[132]

If *Mines* does not stand for—if *Mines* factors are off on that point, I am thinking of a Division out of the Arizona Court of Appeals, *State* v. *Paredes*, out of Division(2). I think Judge Roll was the author of that opinion and I believe that that was relied upon—*U.S.* v. *Mines* was relied upon in order to defeat a similar argument raised by the defense.

The shift change, Your Honor, that occurred—or that was occurring at this time. The agent testified around 2:15, 2:30 they start heading back, and this was all cleared out. I forgot to add that to the reasonable suspicion analysis. He stated that they get a lot of stops during that time because the drug dealers have

lookouts and they look for the times the border patrol are going to be patrolling.

As far as the waving of the children, I would submit to you that was another odd factor that the officer was reasonable in taking into consideration with everything all together.

With that I don't have anything else, if you have any questions for me. I would just submit that and ask you to deny the motion.

THE COURT: Thank you.

Any rebuttal?

MS. BRAMBL: Briefly.

I would first point out that there aren't a whole [133] lot of differences between what Agent Stoddard and the other witnesses said. Even if you take everything that Agent Stoddard said and don't even look at the other testimony, there is still not enough for reasonable suspicion.

A lot of the things that the other witnesses testified to were on points that Agent Stoddard really didn't remember or make a note of the time and could only testify as to his habit.

I would suggest that the testimony of Mr. Arvizu and his sister on whether the agent had his hand on the gun is something they would probably clearly remember and Agent Stoddard would probably be less likely to invent something that happens as it must somewhat frequently.

And I would point out that the *Chon-Jimenez* case does say they specifically found that even though in that case the agent didn't have his gun drawn that

the hand on the gun was an implicitly coercive factor. And Julie Reyes remembers it because she was scared. She found that very frightening, as would a lot of people under those circumstances.

Regarding the standing, I would just point out that I believe my objection was sustained about whether Mr. Arvizu didn't avow or disavow knowledge of the marijuana, but that would be for some later proceeding. Clearly he has standing for the whole search.

I would also point out that Agent Stoddard in his [134] report, and I think on the stand too, pretty much admitted that he made the stop not because he thought there were illegal drugs in the car but to check for alien smuggling, something that there was certainly no reasonable suspicion to support. In fact, his first question was "What country are you a citizen of?" He received satisfactory answers.

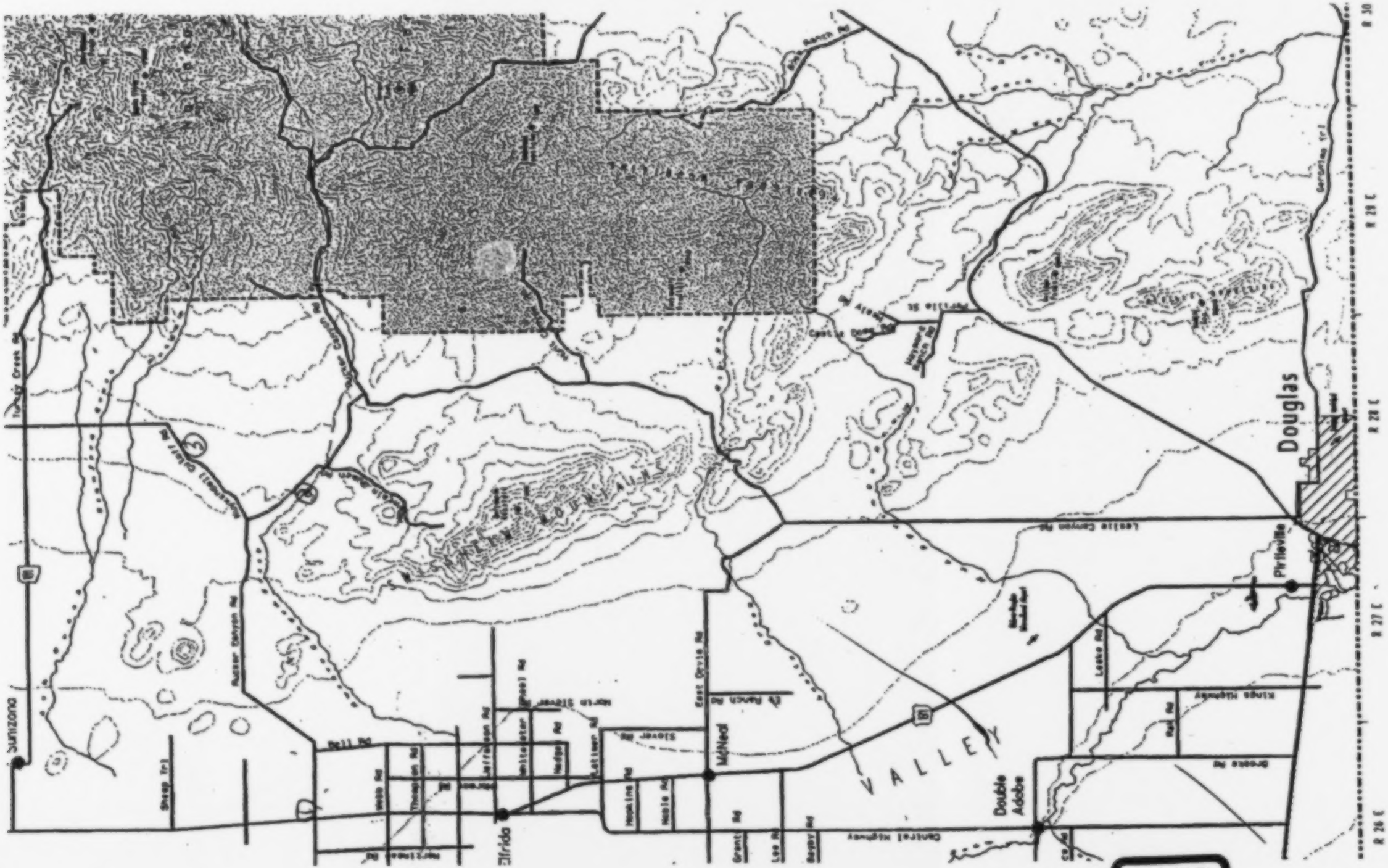
The testimony from both Agent Stoddard and Mr. Arvizu indicated that he looked in the window while he was talking to Mr. Arvizu and could certainly see that there were no illegal aliens or other persons lying or hiding on the floor. So it is just another reason why this stop is not based on reasonable suspicion.

I would also point out that the sensor activity really meant nothing in and of itself because these weren't sensors designed to show activity around the border as are a lot of sensors. These were sensors to show activity in an area 30 miles from the border.

Finally, although there is no requirement that a person be notified they have a right to refuse to consent to a search, in other words it is not mandatory, but it is a factor set forth in *Chon-Jimenez* and other cases.

For all those reasons that I have previously stated, I would ask that you find that this was a stop not supported by reasonable suspicion.

* * * * *



Government Exhibit 40

EXHIBIT 40 CR-87-157-TUC-RMB

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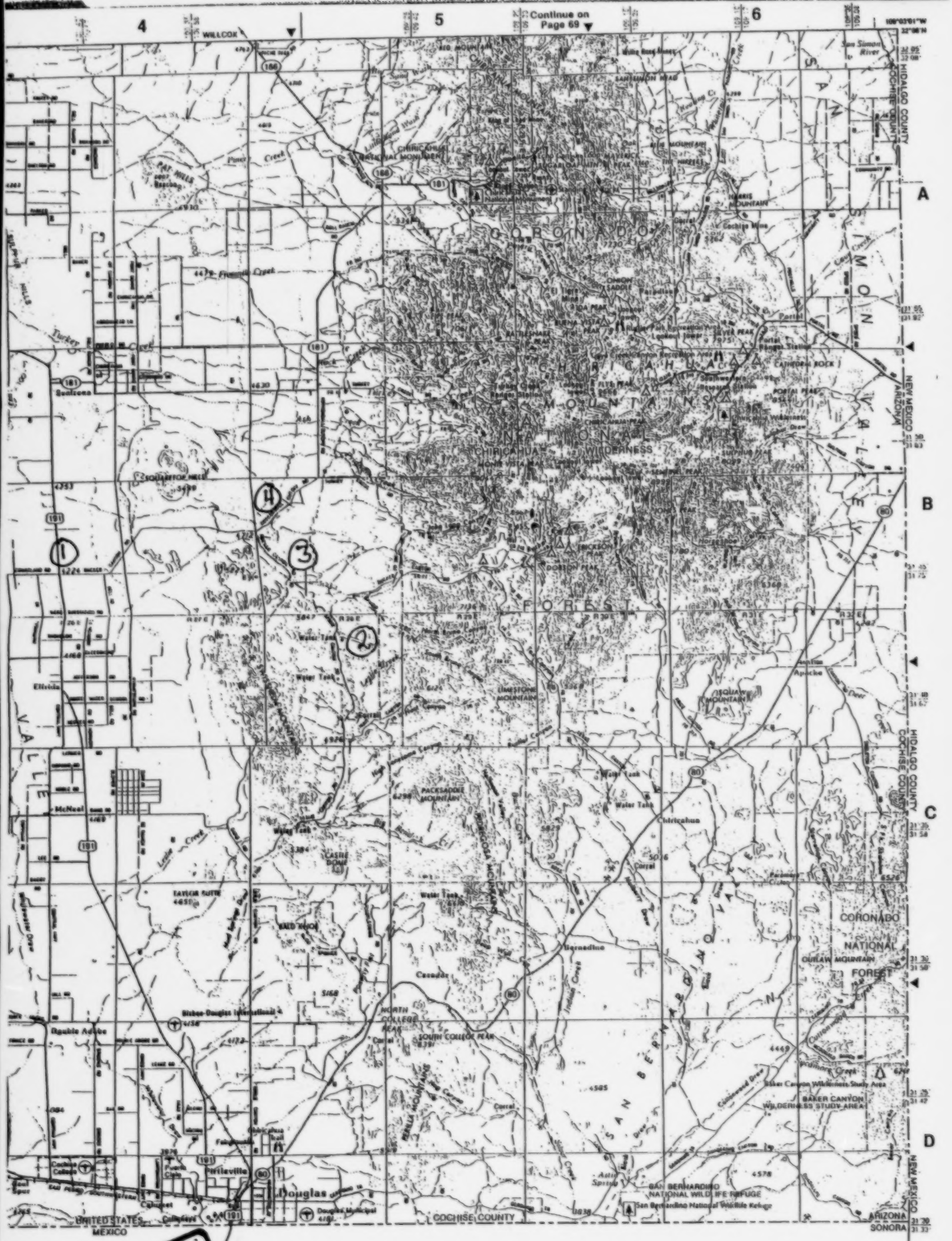
Defense Exhibit 1A



LEGEND

MAP OF DOUGLAS, CHRIICAHUA MOUNTAIN AREA

Notations: The blue highlighted area depicts Mr. Arvizu's route of travel

#1 marks the Border Patrol Check-point at the intersection of Rucker Canyon Road and Highway 191.

#2 marks the approximate location of Border Patrol sensors.

#3 marks the approximate area where Mr. Arvizu's van passed Border Patrol Agent Stoddard's stationary vehicle.

#4 marks the approximate area where the Agent Stoddard stopped Mr. Arvizu's van.

17 20.4 miles from KCC Rd. on Leslie Canyon Rd.

4 adm
98-150

Exhibit 4:
Photograph of Leslie Canyon Road

Facing S.E @ Kuykendall and Rucker Canyon Rd

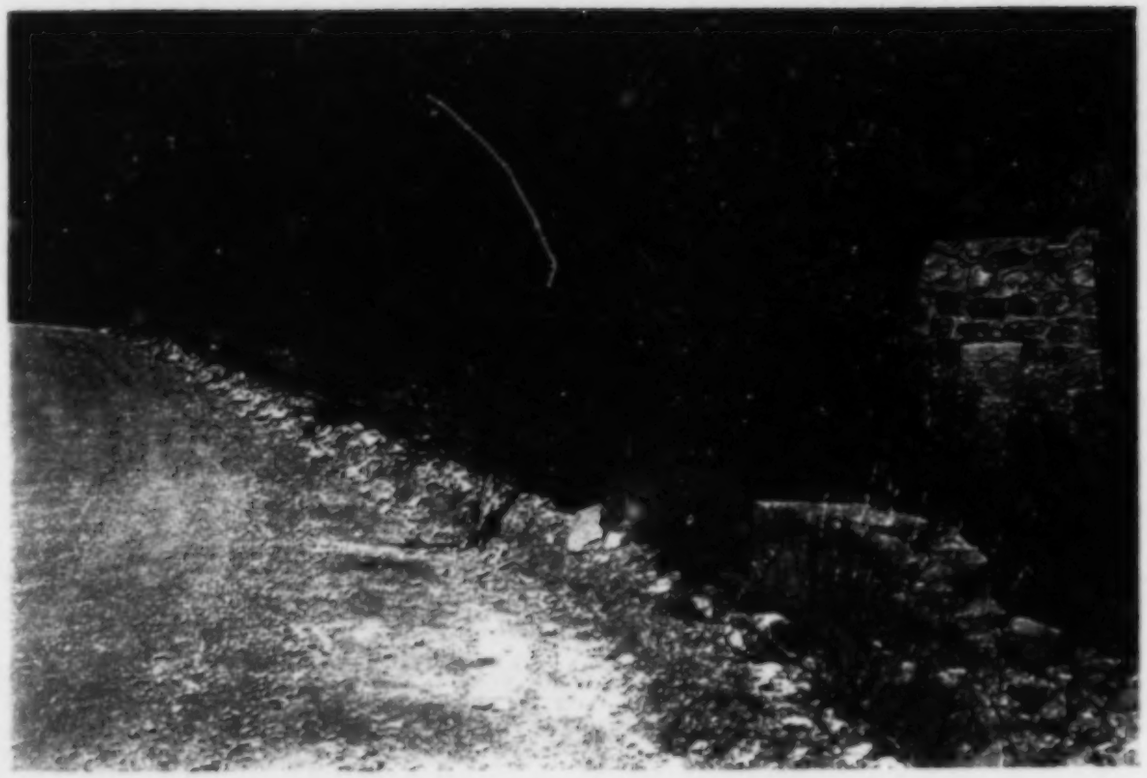
5adm
DR98-157

Exhibit 5:
Photograph of intersection of Kuykendall Cutoff Road and Rucker Canyon Road

C Road Character : Entering Rucker Canyon Rd / Leslie Canyon Rd. @ 5.2 miles from Kenyon & Old P.O. Rd.

Udin 6 98-157

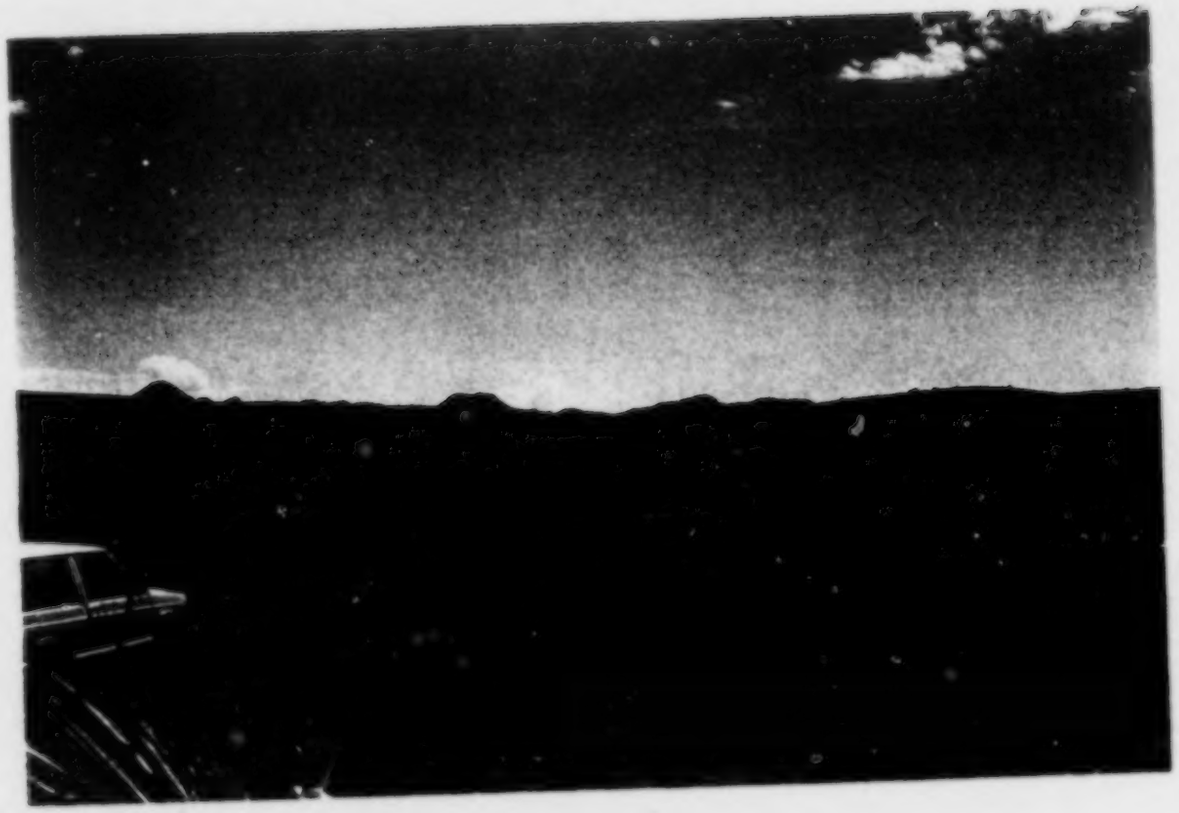
Exhibit 6:
Photograph of intersection of Rucker Canyon Road and Leslie Canyon Road



14 7.3 miles from beginning of S.R. 2.1 Rd
on Leslie Canyon Rd

Adm
ER98-157

Exhibit 7:
Photograph of Leslie Canyon Road



1) Road Character on Leslie Canyon Rd.
2 miles from Kuykendall C.D. Looking S.

Adm
EX 8-157

Exhibit 8:
Photograph of Leslie Canyon Road

1 Road Character looking W@intersection
Leslie Canyon/Rucker Canyon Rd.

Exhibit 9:
Photograph of intersection of Leslie Canyon Road and Rucker Canyon Road

Kuykendall Rd

adm
19
AR98-157

5 ½ miles from Rock.

Exhibit 19:
Photograph of Kuykendall Cutoff Road

Turkey Creek & Kuykendall

ASM 21 2R98-159

Exhibit 21:
Photograph of Kuykendall Cutoff Road and Turkey Creek

Kuykendall Rd

adm
22
LR98-157

Exhibit 22:
Photograph of Kuykendall Cutoff R

Kuykendall & Rucker Canyon Rd

ADM 23 KR98-157

Exhibit 23:
Photograph of Kuykendall Road and Rucke Canyon Road

Kuykendall & Rucker
Canyon Rd

Exhibit 24:
Photograph of Kuykendall Road and Rucker Canyon Road

curve in Kuykendall

3 > miles

Adm 26 DE98157

Exhibit 26:
Photograph of Kuykendall Cutoff Road

Kuykendall Rd

Adm
27
ER98-157

Exhibit 27:
Photograph of Kuykendall Cutoff Road

Kuykendall

dam
32
RP98-157

Exhibit 32:
Photograph of Kuykendall Cutoff Road

Kuykendall

adm
33
DX98151

Exhibit 33:
Photograph of Kuykendall Cutoff

JUL 19 2001

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No. 00-1519

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erroneously departed from the totality-of-the-circumstances test that governs reasonable-suspicion determinations under the Fourth Amendment by holding that seven facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law.

2. Whether, under the totality-of-the-circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

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OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 1a-20a) is reported at 232 F.3d 1241. The oral decision of the district court (Pet. App. 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on December 1, 2000 (Pet. App. 3a). On February 16, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 31, 2001 (a Saturday). The petition was filed on April 2, 2001, and was granted on June 4, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following the denial of his motion to suppress evidence in the district court, respondent entered a conditional plea of guilty to the charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 8a; J.A. 11. Respondent was sentenced to ten months' imprisonment, to be followed by 36 months' supervised release. J.A. 12. The court of appeals reversed. Pet. App. 1a-20a.

1. In January 1998, Border Patrol Agent Clinton Stoddard was assigned to the permanent Border Patrol checkpoint at the intersection of Highway I-191 and Rucker Canyon Road, north of the border town of Douglas, Arizona. Pet. App. 4a-5a.[1] The I-191 checkpoint is approximately 30 miles from the Mexican border. *Id.* at 4a; J.A. 24; see also J.A. 155, 157 (maps). The Border Patrol opens and closes the checkpoint without notice, but when opened, the checkpoint remains open for weeks or months at a time. J.A. 50. As part of its effort to prevent illegal aliens who have crossed the international border in Arizona from

[1] The facts were adduced at a hearing on respondent's motion to suppress evidence, at which the district court took testimony from the arresting officer, a defense investigator, respondent, and respondent's sister, and heard oral argument. See J.A. 15-154.

passing further into the United States, the Border Patrol stops all traffic that passes through the checkpoint when it is open. J.A. 20.[2]

Agent Stoddard had been assigned to the Border Patrol's Douglas station for more than two years. J.A. 18. He had received training on detecting illegal-alien and narcotics smuggling, and on smuggling activity in the Douglas area. J.A. 19-20. Agent Stoddard also had trained other agents on smuggling detection techniques. J.A. 20. Agent Stoddard estimated that while working on "roving patrols," he had stopped more than 50 vehicles carrying illegal aliens or drugs. J.A. 22.

On January 19, 1998, the I-191 checkpoint was open and conducting vehicle inspections. At approximately 2:15 p.m., a sensor monitored by the Border Patrol detected a vehicle traveling north on Leslie Canyon Road. Pet. App. 4a-5a; J.A. 24-25, 28. Leslie Canyon Road begins near the border in Douglas and parallels both I-191, which is to the west, and the boundary of the Coronado National Forest, which is to the east.

[2] This Court has recognized the "formidable law-enforcement problems" associated with illegal immigration from Mexico, *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 553 (1976), as well as "the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country," *United States* v. *Cortez*, 449 U.S. 411, 418-419 (1981). To carry out its mission of enforcing the immigration and narcotics laws, the Border Patrol relies heavily on its power to inspect vehicles at fixed checkpoints in the vicinity of the border, and to make those checkpoints effective by stopping suspicious vehicles that circumvent them. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879 (1975); *Martinez-Fuerte*, *supra* (upholding against Fourth Amendment challenge the use of fixed immigration checkpoints removed from the border).

Pet. App. 4a; see J.A. 25-26, 155, 157.[3] A vehicle traveling north from Douglas can use Leslie Canyon Road to bypass the Border Patrol checkpoint on I-191. Pet. App. 5a; J.A. 26-27. Like most of Leslie Canyon Road, the portion of road where the sensor is located is unpaved dirt. Pet. App. 4a; J.A. 27-28, 98-99; see also J.A. 161, 165-171 (respondent's photographs of Leslie Canyon Road). That portion of Leslie Canyon Road is used mostly by ranchers, Forest Service personnel, and the Border Patrol. Pet. App. 4a; J.A. 26. On a typical day, vehicles trigger the sensor only once every two hours or so. J.A. 57. As Agent Stoddard testified, "[y]ou can sit on that road for hours and not see a vehicle go by." J .A. 28.

The fact that the sensor gave an alert at about 2:15 p.m. was significant because that was approximately the time when the agents who patrolled the area around the I-191 checkpoint suspended their surveillance and began returning to the checkpoint for a 3 p.m. shift change. Pet. App. 5a; J.A. 26, 47-48. As Agent Stoddard testified, smugglers are aware of the Border Patrol's shift changes and they "seem to do the most smuggling * * * when the agents are en route back to the checkpoint." J.A. 26.

Agent Stoddard left the I-191 checkpoint and drove east on Rucker Canyon Road, toward Leslie Canyon Road, to investigate the sensor report. As he drove, a second sensor located north of the first sensor reported traffic, indicating that the vehicle had turned west on Rucker Canyon Road and was coming toward Stoddard and I-191. Pet. App. 5a; J.A. 29. The vehicle was now

[3] The court of appeals incorrectly stated (Pet. App. 4a) that Leslie Canyon Road is in the Coronado National Forest. In fact, the road is entirely outside the national forest. See J.A. 155, 157.

headed away from recreation areas in the national forest, which can be reached by driving east on Rucker Canyon Road. J.A. 29, 31, 52-54; see J.A. 155. If the vehicle next turned right (north) onto Kuykendall Cutoff Road, it would circumvent the I-191 checkpoint and could proceed to cities such as Tucson and Phoenix with very little chance of being stopped by the Border Patrol. That route along dirt roads (north on Leslie Canyon Road paralleling I-191, west on Rucker Canyon Road away from the national forest, and then north on Kuykendall Cutoff Road before reaching the I-191 checkpoint) "is a notorious route of travel" that illegal aliens and drug traffickers use to avoid the checkpoint. J.A. 30.

As Agent Stoddard drove east on Rucker Canyon Road to intercept the vehicle coming west, he spotted a minivan. Based on the minivan's westbound direction, the timing of the sensor alarms, and the absence of any other traffic, Stoddard believed that the minivan was the vehicle that had tripped the sensors. J.A. 31-32. Stoddard pulled his truck to the side of the road so that he could get a good look at the minivan when it passed. Pet. App. 5a; J.A. 32. Agent Stoddard testified that, when the minivan approached the parked Border Patrol vehicle (which was equipped with official lights, see J.A. 107), it slowed dramatically, cutting its speed from approximately 50 to 55 miles per hour to approximately 25 to 30 miles per hour. Pet. App. 6a; J.A. 32, 57.[4]

Agent Stoddard saw five people in the minivan. Respondent was driving, an adult woman was in the front seat, and three children were in the back seats. Agent Stoddard observed that respondent appeared

[4] Respondent testified that he was traveling at "[a]bout 20 to 30 miles an hour" and did not slow down abruptly. J.A. 105.

rigid and nervous. He gripped the steering wheel tightly and avoided eye contact with Stoddard. Pet. App. 6a; J.A. 33.[5] The adult passenger also appeared to Stoddard to be "uptight." J.A. 33-34. The two children in the rear seat sat with their knees unusually high, as if their feet were resting on top of an object on the floor of the vehicle. Pet. App. 6a; J.A. 34.

Agent Stoddard was familiar with the local vehicles in the area, but he did not recognize the minivan. Pet. App. 7a; J.A. 37. The minivan also was noteworthy because most drivers on the dirt roads that respondent traveled use four-wheel drive vehicles. J.A. 36, 63-64. Indeed, at the intersection of Leslie Canyon Road and Rucker Canyon Road, Rucker Canyon Road is signed: "PRIMITIVE ROAD DRIVE WITH CARE." J.A. 83, 171. The Border Patrol had discovered a minivan smuggling marijuana in the same area a few weeks earlier, and Stoddard knew from personal experience and the experience of other agents that smugglers commonly use minivans to carry illegal aliens and drugs. J.A. 27, 33, 74.

Agent Stoddard followed the minivan. All three children in the van then began waving simultaneously, on and off, for about five minutes while facing forward, without ever turning around to look at Stoddard. Pet. App. 6a; J.A. 35-36, 61, 73. Agent Stoddard testified that the waving—which he demonstrated to the district court—"wasn't in a normal pattern." J.A. 35. He

[5] The district court rejected as not credible respondent's assertion that he was relaxed when he saw the Border Patrol vehicle. "I find it very difficult to believe," the district court stated, "that somebody carrying 125 * * * pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer." Pet. App. 24a.

suspected that the waving was being choreographed by the adults. J.A. 35, 61.

After turning his blinker on, then off, then on again, respondent abruptly turned north onto Kuykendall Cutoff Road, the final turn on the route that would bypass the I-191 checkpoint. Pet. App. 6a; J.A. 36; see also J.A. 106. Around that time, Stoddard ran a license check and learned that the vehicle was registered to an address in Douglas. Stoddard recognized the address as being just four blocks north of the Mexican border, on a street that smugglers frequently used as a staging area for transporting illegal aliens and narcotics further into the United States. Pet. App. 7a; J.A. 37-38, 65-67.

Agent Stoddard stopped the minivan. Respondent leaned out of the driver's window and greeted Stoddard in an excited tone of voice. When Agent Stoddard asked where respondent was going, respondent said he was headed to a park, but he could not remember its name.[6] Stoddard observed that respondent's hands were shaking and his forehead was sweaty, even though it was a cool January day. Pet. App. 7a; J.A. 38-43. After asking respondent some questions about his immigration status and cargo, Stoddard asked for and received consent to search the vehicle. Pet. App. 7a-8a, 25a-26a; J.A. 43-44.[7] Agent Stoddard then opened the side door, smelled marijuana, and saw a black duffel bag

[6] Respondent testified at the suppression hearing that he was going to a location known as Turkey Creek "to meet up with a gentleman" whom he did not know, who would be driving a Ford pickup truck. J.A. 116-117.

[7] Although respondent testified that he understood Agent Stoddard only to be seeking permission "[t]o look in" the van, J.A. 112-113, the district court found that "[t]here is no lack of clarity or uncertainty that the agent was asking to search the vehicle if [respondent] consented to that." Pet. App. 26a; see also *id.* at 20a.

under the feet of the two children in the back seat of the vehicle. Pet. App. 8a; J.A. 44-45. Respondent consented to a search of the duffel bag, whereupon Stoddard discovered marijuana wrapped in cellophane. Border Patrol agents later found another bag of marijuana behind the rear seat. J.A. 45-46. The marijuana found in the minivan weighed 123.85 pounds and had an estimated value of $99,080. Crim. Compl.; 1/19/98 U.S. Border Patrol Report of Apprehension or Seizure.

2. Respondent moved to suppress the marijuana on the ground that Agent Stoddard lacked reasonable suspicion to stop the minivan and lacked authority to search it. After taking testimony and hearing argument on the motion, see J.A. 15-154, the district court ruled that Agent Stoddard had reasonable suspicion to stop the minivan, Pet. App. 21a-27a. Stating that the evidence had to be considered "in the context of what was going on out there and in the context of the information available to the officer making the stop," *id.* at 22a, the district court identified ten specific facts that supported Stoddard's suspicion of illegal activity:

(1) The minivan was on "poorly traveled" roads that parallel the interstate highway and are "used to circumvent the checkpoint" on I-191. Pet. App. 22a-23a; see also *id.* at 23a (Leslie Canyon Road "certainly isn't a heavily traveled road by any stretch of the imagination.").

(2) The minivan had passed the only recreation area in the vicinity (which was to the east, off Rucker Canyon Road), and the next recreation area was "quite a few miles to the north," at the Chiricahua National Monument. Pet. App. 22a. The distant recreation area was accessible by taking

I-191 to I-181, which would avoid having to make a "40-mile trip at least, through a dirt road." *Ibid.*

(3) The minivan appeared to "slow[] down appreciably" when respondent saw the parked Border Patrol vehicle. Pet. App. 23a.

(4) The minivan's trip coincided with the beginning of the Border Patrol's shift change, when agents return to the I-191 checkpoint and leave the area open to smugglers. Pet. App. 23a.

(5) In Agent Stoddard's experience, smugglers in the Douglas area use minivans; also, the Border Patrol had recently stopped a similar minivan carrying a load of marijuana in the same area. Pet. App. 23a-24a.

(6) Respondent appeared nervous when he drove past Agent Stoddard and respondent's demeanor was consistent with illegal activity. Pet. App. 24a.

(7) Stoddard, having worked in the area, did not recognize the minivan as being from one of the local ranches. Pet. App. 24a.

(8) The raised position of the children's legs suggested that there was cargo on the rear floor of the minivan. Pet. App. 24a-25a.

(9) The children waved in a "methodical," "mechanical way" for four or five minutes without looking at Agent Stoddard, which "was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this." Pet. App. 25a.

(10) The minivan was registered to an area that Agent Stoddard "kn[e]w to be an often-used smuggling area." Pet. App. 25a.

On the basis of those ten factors, collectively, the district court found that Agent Stoddard had reasonable suspicion to stop the minivan. Pet. App. 25a. The district court further found that respondent consented to the search of his minivan and duffel bag without any coercion by Stoddard, and that, in any event, Stoddard had probable cause to search the bags after he smelled marijuana. *Id.* at 25a-26a.

3. The court of appeals reversed.[8] It recited established standards for determining whether reasonable suspicion exists, see Pet. App. 8a-11a, but indicated concern that the "fact-specific weighing of circumstances" required by these standards "introduces a troubling degree of uncertainty and unpredictability into the process" of determining whether reasonable suspicion exists. *Id.* at 12a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinski, J., concurring), cert. denied, 121 S. Ct. 211 (2000)). Accordingly, the court of appeals was of the view that "[w]hat factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated." *Id.* at 11a (quoting *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J., concurring)). To that end, the court stated that it intended to use this case "to describe and clearly

[8] The court of appeals issued its initial opinion on July 7, 2000. On December 1, 2000, the court revised its opinion and, based on the amended opinion, denied the government's petition for rehearing or rehearing en banc. See Pet. App. 1a-20a. The changes made to the initial opinion are identified at Pet. App. 2a-3a.

delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Id.* at 12a.

Specifically, the court of appeals held that the district court had improperly relied on seven factors that were "neither relevant nor appropriate to a reasonable suspicion analysis in this case," Pet. App. 12a, and "must be disregarded as a matter of law," *id.* at 14a (quoting *Montero-Camargo*, 208 F.3d at 1132). *First*, the court held, "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and cannot contribute to reasonable suspicion of unlawful activity. *Id.* at 12a. *Second*, respondent's failure to acknowledge Agent Stoddard as he drove by the officer "provides no support for Stoddard's reasonable suspicion determination." *Id.* at 13a. *Third*, the children's "odd act" of waving to Agent Stoddard without looking at him "carries no weight in the reasonable suspicion calculus." *Id.* at 13a-14a. *Fourth*, the court continued, "[t]he fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion." *Id.* at 14a. *Fifth*, Agent Stoddard's failure to recognize the minivan as a local vehicle "fails to contribute to the reasonable suspicion calculus" because "the area in question is one that is used for many purposes by different kinds of people." *Ibid.* *Sixth*, the fact that the minivan was "registered to an address in a block notorious for smuggling is also of no significance and may not be given any weight." *Id.* at 15a. *Seventh*, and finally, the court ruled that the appearance that there was cargo on the floor of the minivan, "while consistent with [carrying] illicit substances," was "all too common to be of any relevance." *Id.* at 16a-17a.

The court of appeals deemed only three factors relevant to reasonable suspicion analysis: the road used by the minivan was sometimes used by smugglers; the minivan was traveling around the time of the Border Patrol's shift change; and, as a general matter, smugglers sometimes use minivans. Pet. App. 17a. The court of appeals concluded that those three factors, considered in isolation from the other seven factors that it deemed irrelevant, did not "constitute reasonable suspicion either singly or collectively." *Ibid.* The route taken by respondent, in the view of the court, was "of only moderate significance" because "the road in question is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. The shift change, the court concluded, "is of little probative value" because the minivan tripped the first sensor approximately 45 minutes before the shift change. *Id.* at 18a. And minivans, the court stated, "although sometimes used by smugglers, are among the best-selling family car models in the United States." *Ibid.*

Based on that analysis, the court of appeals held that Agent Stoddard's stop of respondent's minivan was unlawful and that the unlawful stop tainted respondent's consent to the search of his vehicle. Pet. App. 18a-19a. The court of appeals therefore reversed the district court's denial of respondent's motion to suppress evidence and remanded the case. *Id.* at 20a.

SUMMARY OF ARGUMENT

1. This Court has held repeatedly and consistently, over the course of more than 30 years, that reasonable-suspicion analysis requires examination of all the facts known to the law-enforcement officer who makes an investigative stop. Because courts must consider "the whole picture" seen by the officer, *United States* v. *Cortez*, 449 U.S. 411, 417 (1981), conduct that is ambiguous and susceptible of an innocent explanation when viewed in isolation can nevertheless support reasonable suspicion.

The court of appeals suggested that contextual application of the Fourth Amendment's reasonableness standard, as required by this Court, makes it too uncertain whether particular conduct will or will not support an investigative stop. Reasonable suspicion, however, is a commonsense concept rather than a technical one, and it is not susceptible to expression in "a neat set of legal rules." *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). Because reasonable suspicion is inherently contextual, rules of the sort adopted by the court of appeals—which broadly address particular facts without regard for context—create the potential for misapplication of the Fourth Amendment. If those rules were made more specific in an effort to minimize constitutional error, they would be too numerous and too complicated for officers to apply when they make the split-second decision whether to stop an individual for questioning. This Court's contextual approach therefore is more faithful to the text of the Fourth Amendment, as well as more responsive to the practical requirements of law enforcement, than the court of appeals' categorical rules.

The specific rules adopted by the court of appeals are plainly incorrect. The court of appeals held, for example, that some types of conduct, such as decelerating upon seeing a law-enforcement vehicle and carrying cargo on the floor of a family minivan, are nearly always innocent and cannot contribute to reasonable suspicion. Yet under any number of scenarios—including the facts of this case—those actions do raise objectively reason-

able questions about possible illegal conduct. An individual's reaction upon seeing a law enforcement officer, which the court of appeals also deemed irrelevant as a matter of law, likewise can suggest possible criminal activity under some circumstances. The same is true of the address to which an individual's vehicle is registered, which the court of appeals excluded from consideration as a matter of law. In each instance, the court of appeals' rule requiring exclusion of the factor sweeps far too broadly and contravenes the totality-of-the-circumstances approach.

2. When all of the facts are considered, reasonable suspicion supported Agent Stoddard's decision to stop respondent and question him. Respondent's route bypassed the fixed Border Patrol checkpoint on I-191, and none of the information available to Agent Stoddard provided an innocent explanation for respondent's choice of that route; it was a time of day when smugglers increase their activity because of the Border Patrol's shift change; respondent appeared to be carrying a large amount of hidden cargo; the minivan's registration suggested that respondent's northbound trip had begun on a street that was very close to the Mexican border and was known as a common starting point for smuggling runs; smugglers in the Douglas area had used minivans in the same area in the recent past; and respondent and his passengers appeared nervous and behaved oddly upon seeing Agent Stoddard's Border Patrol vehicle. Each of those facts reinforced the others, and together they made it objectively reasonable for Agent Stoddard to suspect that respondent was carrying illegal cargo.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY CATEGORICALLY EXCLUDING FACTS FROM CONSIDERATION IN THE TOTALITY-OF-THE-CIRCUMSTANCES INQUIRY

This Court has held repeatedly that the Fourth Amendment requires courts to consider the totality of the circumstances surrounding a law-enforcement officer's decision to make an investigative stop. The significance of a particular fact must be determined in the context of the other facts known to the officer, and cannot be established for all cases on a categorical basis. That rule is consistent not only with the reasonableness standard of the Fourth Amendment, but also with the practical realities of law enforcement.

A. Reasonable-Suspicion Analysis Requires Consideration Of "The Whole Picture" Seen By The Officer

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court made clear that the reasonableness of a law-enforcement officer's suspicion must be judged by considering the totality of the circumstances known to the officer, and facts that do not inherently suggest criminal activity may, in context, support such an inference by the officer. In *Terry*, a police officer on his beat observed two men taking turns walking past a store window and repeatedly conferring with each other and with a third man. Suspecting that the men were "casing" the store for "a stick-up," the officer approached the three men, identified himself as a police officer, and asked for their names. *Id.* at 6-7. After getting no clear response, the officer grabbed and patted down one of the men (Terry), and felt a pistol. The officer then ordered all

three men into a store, patted down Terry's companions, found another gun, and took all three men into custody. *Id.* at 7. Terry was charged with carrying a concealed weapon, and the state courts denied his ensuing motion to suppress the evidence. *Id.* at 7-8.

This Court held that the officer "seized" Terry for Fourth Amendment purposes when he took hold of him, 392 U.S. at 16-19, but that the stop to investigate possibly criminal activity was not as intrusive as an arrest and did not have to be justified by probable cause, *id.* at 20-23. The governing constitutional principle was that the seizure (and the ensuing search for weapons) may not be "unreasonable," *id.* at 9, 20; see U.S. Const. Amend. IV, which turns on "the facts of the case," 392 U.S. at 15; see *id.* at 21 ("a judge * * * must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances"). Specifically, "the police officer must be able to point to specific and articulable facts" available to the officer at the moment of the seizure "which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Id.* at 21. Applying that standard, the Court found it immaterial that the visible acts of Terry and his companions—standing on a street corner, walking up and down a street, looking in a store window, and conversing—might "each [be] perhaps innocent in itself." *Id.* at 22. When "taken together," those acts "warranted further investigation" and justified the initial stop of Terry. *Id.* at 22-23.

In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the Court applied *Terry*'s reasonable-suspicion test, including the totality-of-the-circumstances approach, to an investigative stop of a car near the Mexican border. *Id.* at 878-885. "[W]hen an officer's observations lead him reasonably to suspect that a

particular vehicle may contain aliens who are illegally in the country," the Court held, "he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881. The Court listed "illustrative" factors that may be taken into account when deciding whether reasonable suspicion exists to stop a vehicle near the Mexican border. *Id.* at 884-885 & n.10.[9] The Court stressed, however, that "[e]ach case must turn on the totality of the particular circumstances." *Id.* at 885 n.10. "In all situations," moreover, "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Id.* at 885.

Since *Terry*, this Court has rejected holdings by lower courts that have attempted to limit the range of facts that officers may consider in making investigative stops. In *United States* v. *Cortez*, 449 U.S. 411 (1981), for example, Border Patrol agents predicted from signs of past smuggling activity that a vehicle would pick up a group of illegal aliens at a particular point along a highway in southern Arizona, on a certain night. *Id.* at 413-415. The agents staked out the highway and observed a pickup truck with a camper shell drive toward the predicted pick-up location, and then return after a period of time that correlated with the round-trip distance to the expected pick-up point. The agents stopped the truck and found illegal aliens. *Id.* at 415-

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[9] Those factors are: (1) the characteristics of the area where the vehicle is traveling, such as "[i]ts proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic;" (2) information about recent illegal border crossings; (3) the driver's behavior, such as "erratic driving or obvious attempts to evade officers;" (4) "[a]spects of the vehicle itself," such as its capacity to hold concealed cargo or signs that the vehicle is heavily loaded; and (5) personal characteristics or dress suggesting Mexican nationality. 422 U.S. at 884-885.

416. The Ninth Circuit reversed the ensuing convictions, holding that the reasonable suspicion test required "something * * * in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity," and that the stop was invalid because the truck's trip down the highway and back was consistent with "innocent inferences." *United States* v. *Cortez*, 595 F.2d 505, 508 (9th Cir. 1979).

This Court reversed. In finding that the stop was supported by reasonable suspicion, the Court explained that "the essence" of the reasonable suspicion test "is that the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. The Court made clear that the question is not, as the Ninth Circuit had suggested, whether some specific fact "affirmatively suggests particular criminal activity," 595 F.2d at 508 (emphasis omitted), but "whether, based upon the whole picture, [the officers] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," 449 U.S. at 421-422.

Six years later, in *United States* v. *Sokolow*, 490 U.S. 1 (1989), the Court again reviewed an attempt by the Ninth Circuit to depart from the totality-of-the-circumstances approach. In *Sokolow*, federal agents stopped an airline passenger on suspicion of being a drug courier, primarily because of six facts: the passenger paid for his tickets with cash; he traveled under a name that did not match the listing for the telephone number he gave; he flew from Hawaii to Miami (a source city for narcotics) and back; he stayed in Miami only 48 hours, despite the long trip; he appeared nervous; and he did not check his luggage. *Id.* at 3-5. The agents found drugs after a drug-sniffing dog alerted on the passenger's bag, and the district court denied a motion to suppress the evidence. *Id.* at 5-6.

The court of appeals reversed. It held that facts bearing on reasonable suspicion are appropriately divided into two categories: "facts describing 'ongoing criminal activity,'" and "facts describing 'personal characteristics' of drug couriers." 490 U.S. at 6 (quoting *United States* v. *Sokolow*, 831 F.2d 1413, 1419, 1420 (9th Cir. 1987)). In the court of appeals' view, personal characteristics are relevant to reasonable suspicion only if (1) they are accompanied by evidence of ongoing criminal activity, and (2) the government shows "that the combination of facts at issue d[oes] not describe the behavior of 'significant numbers of innocent persons.'" *Ibid.* (quoting 831 F.2d at 1420). Applying that test, the court of appeals found no evidence of ongoing criminal activity and held the stop of Sokolow unconstitutional. *Ibid.*

This Court rejected the Ninth Circuit's "effort to refine and elaborate the requirements of 'reasonable suspicion,'" noting that it created "unnecessary difficulty." 490 U.S. at 7-8. Under the correct analysis, it is not possible to attach "ironclad significance" to particular factors as evidence of ongoing criminal activity under all circumstances, but neither can other factors be dismissed as "consistent with innocent travel," without reference to the surrounding facts. *Id.* at 8-9. Applying those principles, the Court held that the federal agents had sufficient grounds to stop the airline passenger. *Id.* at 8-11.

Most recently, in *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), the Court once again considered whether lawful conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless contribute to reasonable suspicion. *Id.* at 125. *Wardlow* involved a

stop of a suspect who fled at the sight of police entering an area. The Court rejected the holding of the Illinois Supreme Court that running from police must be considered innocent as a matter of law, see *id.* at 122-123, and noted that an officer may give weight to ambiguous conduct when making "commonsense judgments and inferences" about the likelihood that illegal activity is occurring, *id.* at 125 (citing *Cortez*, 449 U.S. at 418). Thus, an individual's presence in a high-crime area—although it would not alone provide reasonable suspicion—may be considered in reasonable-suspicion analysis. *Ibid.* So too, Wardlow's unprovoked flight from the police was cognizable in accordance with the general rule "that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Id.* at 124.

B. The Court Of Appeals' Categorical Approach To The Reasonable-Suspicion Inquiry Is Inconsistent With This Court's Holdings

Notwithstanding this Court's consistent instruction, the Ninth Circuit held in this case that the reasonable-suspicion inquiry does not allow consideration of all the circumstances known to the investigating officer. In "attempt[ing] * * * to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops," Pet. App. 12a, the court of appeals articulated precisely the sort of inflexible legal rules that are neither useful nor permissible under the rubric of reasonable suspicion. See *Sokolow*, 490 U.S. at 7-8. By ruling that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case" (Pet. App. 12a), moreover, the court of appeals ignored "the essence of all that has

been written." *Cortez*, 449 U.S. at 417. That is, "the totality of the circumstances—the whole picture—must be taken into account." *Ibid.*

1. The court of appeals forthrightly stated its intent to "delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." Pet. App. 12a. Consistent with that intent, the court eliminated seven different facts observed by Agent Stoddard from the reasonable-suspicion calculus "as a matter of law," *id.* at 14a (internal quotation marks omitted), without limiting its exclusions to this one case. See *id.* at 12a-17a. In *United States* v. *Sigmond-Ballesteros*, 247 F.3d 943 (9th Cir. 2001), moreover, the court of appeals cited its decision in this case for the proposition "that only 'certain factors may be considered by law enforcement officers in making stops'" of traffic near the border. *Id.* at 947 (quoting Pet. App. 12a). Such a rule is unequivocally foreclosed by this Court's totality-of-the-circumstances test.

2. The court of appeals suggested that the totality-of-the-circumstances test should be limited because, otherwise, "no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it."[10] Pet. App. 12a. This Court has

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[10] Although the court of appeals here quoted from Judge Kozinski's concurrence in *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1140, 1142 (9th Cir.) (en banc), cert. denied, 121 S. Ct. 211 (2000), Judge Kozinski did not suggest that certain facts indicating criminal activity should be disregarded. Judge Kozinski's principal point was that a single factor known to a law enforcement officer (such as turning one's car around just short of a Border Patrol checkpoint) may alone provide reasonable suspicion, making it unnecessary to consider other, supporting considerations. *Id.* at 1140-1142. Judge Kozinski additionally

already rejected that reasoning. In *Cortez*, the Court acknowledged that "[t]erms like 'articulable reasons' and 'founded suspicion' * * * fall short of providing clear guidance dispositive of the myriad factual situations that arise," 449 U.S. at 417, but concluded that "common-sense conclusions about human behavior * * * by those versed in the field of law enforcement" nevertheless provide a firm foundation for reasonable-suspicion analysis, *id.* at 418. The Court noted that just as jurors are permitted to make determinations based on all the information before them, without rigid rules for weighing the evidence, "so are law enforcement officers." *Ibid.*; see also *Sokolow*, 490 U.S. at 7-8.

In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the Court reached a similar conclusion in the context of probable-cause determinations. The Illinois Supreme Court had held that an informant's tip could not contribute to probable cause unless the tip (1) revealed the informant's basis of knowledge, and (2) provided facts establishing either the veracity of the information or, alternatively, the reliability of the report. *Id.* at 228-229; see *Spinelli* v. *United States*, 393 U.S. 410, 413-416 (1969). This Court rejected that rule and held that the "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." 462 U.S. at 230-231. "One simple rule," the Court concluded, "will not cover every

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suggested that it is not helpful to disaggregate and assign different weights to various categories of factors. *Id.* at 1142 ("[W]e now have different classes of factors—regular and jumbo. How many regular factors add up to make a substantial factor? And how many substantial factors amount to reasonable suspicion? I have no clue, which makes me think that cops on their beats all over this circuit will have some trouble figuring it out as well.").

situation." *Id.* at 231-232 (internal quotation marks omitted). The two-pronged test applied by the state court "encouraged an excessively technical dissection of informants' tips," and focused "undue attention * * * on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Id.* at 234-235. The Court applied the reasoning of *Gates* to the reasonable-suspicion inquiry in *Sokolow*, 490 U.S. at 7-8.

In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court made a similar point in holding that district courts' determinations about the existence of reasonable suspicion (and probable cause) are subject to de novo review. The Court acknowledged in *Ornelas* that the totality-of-the-circumstances rule "is multi-faceted," 517 U.S. at 698, and that "[a]rticulating precisely what 'reasonable suspicion' * * * mean[s] is not possible," *id.* at 695. But the Court observed that contextual application of a "fluid concept[]" better fits the Fourth Amendment's reasonableness standard than any "neat set of legal rules." *Id.* at 695-696 (internal quotation marks omitted). See also *Ker* v. *California*, 374 U.S. 23, 33 (1963) (because "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," "[e]ach case is to be decided on its own facts and circumstances").

This Court's repeated rejection of inflexible rules for reasonable-suspicion analysis reflects the "the myriad factual situations that arise" in law enforcement. *Cortez*, 449 U.S. at 417. That variety makes it extremely difficult to craft rules that are sufficiently general to be useful in a broad range of cases, yet sufficiently specific to be meaningful in practical application. It also would be unreasonable to expect law-enforcement officers to recall and apply, "on the spur

(and in the heat) of the moment" (*Atwater* v. *City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001)), a large and ever-increasing body of judicial precedent regarding what factors may or may not be considered, and what amount of weight must be assigned to each cognizable factor. Cf. *id.* at 1553-1555 (noting practical difficulty of applying a rule that forbids warrantless arrests for a limited category of crimes).

The particular rules adopted by the court of appeals in this case compound the practical problems inherent in any effort to limit the totality-of-the-circumstances approach. The Ninth Circuit would require law-enforcement officers to ignore facts that, based on the officer's training and experience, contribute to reasonable suspicion. Whenever a fact observed by an officer already has been found irrelevant as a matter of law under the Ninth Circuit's approach, the officer must attempt to exclude the fact from his or her assessment of the situation. The officer thus is left to guess about what degree of suspicion would exist in the absence of the forbidden fact. Officers also must attempt to anticipate whether other factors they deem significant under the totality of the circumstances might fail an ill-defined standard of "sufficient" relevance when isolated from the surrounding facts during judicial proceedings that may occur "months and years after [the stop] is made." *Atwater*, 121 S. Ct. at 1553-1554. The result of the court's rule would be to substitute an appellate court's "library analysis" for "common-sense conclusions * * * by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418.

3. The court of appeals further suggested (Pet. App. 12a-17a) that some types of activity should be excluded from the reasonable-suspicion inquiry because: (1) they are almost always innocent; (2) they invite subjective

application by law-enforcement officers; or (3) considering them would put some groups of law-abiding citizens (particularly members of minority groups) at a heightened risk of being stopped by law-enforcement officers. The court of appeals' concerns provide no basis for departing from the totality-of-the-circumstances test.

a. With respect to the court of appeals' view that certain behavior is virtually always innocent, this Court has settled beyond question that behavior can be common among law-abiding citizens, and innocent to untrained eyes, yet nevertheless relevant to reasonable-suspicion analysis. In *Sokolow*, for example, the Court explained that facts that individually are "quite consistent with innocent travel"—such as paying cash for an airline ticket or taking a long flight to Miami and staying only a short time—can "together * * * amount to reasonable suspicion." 490 U.S. at 8-9. Likewise, the *Wardlow* Court rejected the argument that fleeing from the police could not support reasonable suspicion because "there are innocent reasons" why one might run from law-enforcement officers. 528 U.S. at 125. Noting that "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation," the Court reiterated that wholly lawful conduct can create ambiguity about possible illegal activity and thereby warrant an investigative stop. *Id.* at 125-126; see *id.* at 130 n.4 (Stevens, J., concurring in part and dissenting in part) ("sometimes behavior giving rise to reasonable suspicion is entirely innocent"); *Terry*, 392 U.S. at 22-23. See also *Cortez*, 449 U.S. at 419 ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion

of a particular person and for action on that suspicion.").[11]

Thus, it was error for the court of appeals categorically to dismiss deceleration upon seeing a Border Patrol vehicle as "in no way indicative of criminal activity" (Pet. App. 12a). See, *e.g.*, *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998) ("While we recognize that deceleration is a common and often completely innocent response to the approach of a patrol car, we hold that it may be one factor contributing to the reasonable suspicion justifying a stop.").[12]

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[11] Some "innocent" behavior enjoys specific constitutional protection that may affect its consideration as part of the reasonable-suspicion inquiry. See *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate [with law-enforcement officers], without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); *Terry*, 392 U.S. at 34 (White, J., concurring) ("[A]nswers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."); see also *INS* v. *Delgado*, 466 U.S. 210, 216-217 (1984) (if an individual declines to consent to questioning by the police "and the police take additional steps * * * to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure"). No such protected behavior was an ingredient of the officer's reasonable suspicion in this case.

[12] Sudden deceleration may indicate, on the particular facts, that the driver is attempting to avoid the police. See, *e.g.*, *Villalobos*, 161 F.3d at 287, 291 (car "decelerated and fell back a mile or more" after being passed by a Border Patrol vehicle); *United States* v. *Magana*, 797 F.2d 777, 781-782 (9th Cir. 1986) (driver slows from 70 to 45 miles per hour, apparently to avoid passing INS vehicles). Sudden deceleration also may suggest under the circumstances that the driver is unusually distracted by or nervous upon seeing the police, which would contribute to suspicion of illegal activity. See, *e.g.*, *United States* v. *Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001) ("[T]he driver slowed and began to swerve within his lane once the [Border Patrol] Agents began to follow him."); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1485 (10th Cir. 1994); *United States* v. *Cardona*, 955 F.2d 976, 981 (5th Cir. 1992) (vehicle slowed and began weaving after Border Patrol agents began following it, indicating that the driver was watching the agents in his rearview mirror).

The court of appeals likewise erred when it ruled (Pet. App. 17a) that the apparent presence of cargo on the floor of respondent's minivan was "too common to be of any relevance." The court of appeals did not dispute that a vehicle's "heavily loaded" appearance can suggest concealment of illegal aliens, *Brignoni-Ponce*, 422 U.S. at 885, but it limited that principle to situations in which "the vehicle [i]s riding low or respond[ing] sluggishly to bumps," Pet. App. 16a-17a. The court's limitation is plainly inappropriate, because other observations—even "common" ones—may raise reasonable questions about the presence of hidden illegal aliens in a vehicle.[13]

For similar reasons, the court of appeals erred by barring consideration of Agent Stoddard's belief that respondent's minivan was not associated with a local ranch. See Pet. App. 14a-15a. *Brignoni-Ponce* estab-

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[13] This Court, for example, has held that the use of bed sheets to cover the windows of a pickup truck's camper shell supported an inference that the truck was carrying hidden cargo. *United States* v. *Sharpe*, 470 U.S. 675, 682 n.3 (1985). Similarly, the Fifth Circuit held that a tarp over the bed of a pickup truck, together with the presence of a spare tire in the back seat (suggesting that extra room was needed in the bed), supported reasonable suspicion of alien smuggling. *United States* v. *Orozco*, 191 F.3d 578, 582 (5th Cir. 1999). In *United States* v. *Magana*, the Ninth Circuit held that a cargo of plywood and clothing that obstructed the view into the back of a pickup truck was a factor that justified a stop to check for illegal aliens. 797 F.2d at 780-781.

lished that "the usual patterns of traffic on the particular road" where a stop is made are potentially relevant to reasonable suspicion. 422 U.S. at 884-885. And the courts of appeals recognize that an unfamiliar vehicle can raise legitimate questions in the mind of an experienced law-enforcement officer.[14]

b. The court of appeals also erred in suggesting (Pet. App. 12a, 13a-14a) that facts relating to an individual's acknowledgment of, or failure to acknowledge, a law-enforcement officer should be excluded from *Terry* analysis because officers otherwise may apply them subjectively. The court reasoned that the range of behavior that may be deemed suspicious is so broad that "reliance upon 'suspicious' looks [or, as the case may be, the failure to look] can . . . easily devolve into a case of damned if you do, equally damned if you don't." *Id.* at 13a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1136 (9th Cir.) (en banc), cert. denied, 121 S. Ct. 211 (2000)) (court's alterations).[15]

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[14] See, *e.g.*, *United States* v. *Gonzalez*, 190 F.3d 668, 670, 671-672 (5th Cir. 1999) (agents' failure to recognize vehicle supports reasonable suspicion); *Magana*, 797 F.2d at 780 ("[T]he out-of-state license plate indicated that the truck did not belong to any local farmer."); *United States* v. *Leyba*, 627 F.2d 1059, 1064 (10th Cir.) (license plate from a neighboring State contributes to reasonable suspicion of alien trafficking where Border Patrol agent did not recognize the vehicle as local traffic), cert. denied, 449 U.S. 987 (1980); *United States* v. *Sarduy*, 590 F.2d 1355, 1356, 1358 (5th Cir. 1979) (where agents "knew 'just about everybody that lives out on the ranches,'" their failure to recognize a pickup truck supported reasonable suspicion).

[15] In his dissenting opinion in *Sokolow*, Justice Marshall made a similar argument that criminal "profiles" have a "chameleon-like way of adapting to any particular set of observations." 490 U.S. at 13 (internal quotation marks omitted). Justice Marshall indicated, however, that he did not consider such concerns well-founded when an investigative stop is supported by "case-by-case police work" and "fact-specific inferences," rather than "mechanistic application of a formula of personal and behavioral traits in deciding whom to detain." *Ibid.*

As the Ninth Circuit correctly recognized in *Montero-Camargo*, however, facts such as "eye contact [with an officer], or the lack thereof * * * must be evaluated in light of the circumstances of each case." 208 F.3d at 1136 (internal quotation marks omitted). A driver's quick glance at a law-enforcement vehicle in a rear-view mirror may be insignificant, *ibid.*, whereas it would be relevant that a pedestrian looked at an officer just before he rushed to a car and drove away, *United States* v. *Gordon*, 231 F.3d 750, 755, 756 (11th Cir. 2000). Likewise, looking away from a law-enforcement officer may be "quite natural" when there is other, eye-catching activity to view, *United States* v. *Pulido-Santoyo*, 580 F.2d 352, 354 (9th Cir.), cert. denied, 439 U.S. 915 (1978), but highly relevant when it appears to be an attempt to conceal one's face. See, *e.g.*, *Sigmond-Ballesteros*, 247 F.3d at 949; *United States* v. *Tate*, 648 F.2d 939, 941, 942 (4th Cir. 1981); see also *Brignoni-Ponce*, 422 U.S. at 885 (Border Patrol may take into account an observation that "persons [are] trying to hide."). The significance of looking at or acknowledging an officer therefore must be decided in context.

c. Finally, the court of appeals suggested (Pet. App. 15a) that it is appropriate to exclude factors such as where a person lives because considering such factors in reasonable-suspicion analysis may affect particular socioeconomic groups or minorities disproportionately. The court of appeals did not suggest that Agent Stoddard harbored any impermissible motive when he stopped respondent's minivan, and the officer's subjec-

tive intent would be irrelevant in Fourth Amendment analysis. "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race," but "the constitutional basis for objecting to intentionally discriminatory application of laws is [equal protection], not the Fourth Amendment." *Whren* v. *United States*, 517 U.S. 806, 813 (1996).[16]

In the absence of any impermissible motive for the stop in this case, the court of appeals appeared to conclude (Pet. App. 15a) that the objective fact that an individual resides in an area known for crime must be

[16] As a matter of Fourth Amendment law, the courts of appeals generally hold that race and ethnicity are insufficient in themselves to support an investigative stop, but may contribute in some circumstance to a well-founded suspicion of criminal conduct. See, *e.g.*, *United States* v. *Morrison*, 2001 WL 687624, at *4 (7th Cir. June 20, 2001) ("When police are searching for a bank robber described as a black male, it is reasonable for them to be looking for a black man."); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994) (Hispanic appearance relevant to Border Patrol stop); *United States* v. *Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994) ("nationality or race may be relevant factors in some instances"); but see *Montero-Camargo*, 208 F.3d at 1131-1135 (agreeing that racial or ethnic appearance "may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance," *id.* at 1134 n.22, but holding that Hispanic appearance generally may not be considered in areas with large Hispanic populations). See also *Brignoni-Ponce*, 422 U.S. at 886-887 ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity.") (citing *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976)).

disregarded as matter of law. Yet the facts of this case illustrate that the court of appeals' prohibition on considering the address to which a vehicle is registered (which the court treated as a proxy for the residency of the vehicle's occupants) is unfounded. The 400 block of 4th Street in Douglas was known for having "stash houses" and as a base for smuggling aliens and narcotics away from the border area. J.A. 37-38, 66-67. The van's registration to that block therefore suggested that respondent's northbound trip may have originated in a smuggling area, which supported an inference that the van was using the back roads for smuggling. The registration might have had very different implications if, for example, the van had been parked in a shopping district near the 400 block of 4th Street. That is another illustration of the fundamental point, missed by the court of appeals in this case, that reasonable-suspicion analysis must be undertaken "in light of the particular circumstances." *Terry*, 392 U.S. at 21; see *id.* at 15 ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.").

II. THE INVESTIGATIVE STOP IN THIS CASE WAS LAWFUL

Because of its methodological errors, the court of appeals reached the wrong result in this case. The court of appeals never purported to consider "the whole picture" seen by Agent Stoddard. *Cortez*, 449 U.S. at 417. Instead, the court disaggregated the factors that Agent Stoddard deemed *collectively* significant, and dismissed them one by one. The court of appeals thus transformed the reasonable-suspicion inquiry into a series of hurdles, each of which the prosecution had to

overcome by showing the significance of an isolated fact.

Had the court of appeals applied the reasonable-suspicion test correctly, it would not have asked whether each factor *individually* suggested illegal activity. It would have asked whether the totality of the circumstances known to Agent Stoddard and recognized by the district court justified a brief stop of respondent's vehicle to investigate the possibility of a crime. The answer to that question is "Yes."

As the district court explained (Pet. App. 22a-25a), Agent Stoddard knew at the time he stopped respondent that respondent was taking a lightly traveled route that smugglers used to evade a fixed border patrol checkpoint. The route chosen by respondent required a 40-mile trip over mostly dirt roads, when taking the highway would have been quicker and easier. Respondent was traveling at a time of day when smuggling activity in the area increased because of the Border Patrol's shift change.[17] He was driving a type of vehicle that was capable of holding concealed illegal aliens or bulky drugs and had been used by smugglers in the recent past. Agent Stoddard did not recognize the vehicle as being associated with any of the ranches

[17] The court of appeals held that the time at which respondent triggered the Border Patrol's sensors had "little probative value" because the first sensor was triggered approximately 45 minutes before the scheduled 3 p.m. shift change. Pet. App. 18a. The court of appeals' reasoning ignored the time it takes agents to drive back to the checkpoint for the shift change. Consistent with Agent Stoddard's testimony (J.A. 47), the district court found that the sensor was triggered at approximately the same time that "agents are returning to the checkpoint[,] leaving this area open" to smugglers. Pet. App. 23a.

in the area.[18] Respondent's hesitation at the corner of Rucker Canyon Road and Kuykendall Cutoff Road further suggested that he was not familiar with the area (or, alternatively, that respondent was unusually distracted by the Border Patrol vehicle behind him). See Pet. App. 22a-24a; J.A. 36.

Agent Stoddard also knew that the minivan was registered to a particular block in Douglas that was very close to the Mexican border and was commonly used as a staging area for smuggling illegal aliens and narcotics further north. Pet. App. 25a; J.A. 37-38, 66-67. That information, together with the minivan's northbound route from Douglas, supported an inference that the vehicle had started its unusual trip at "an often-used smuggling area" (Pet. App. 25a). See p. 31, *supra*.[19]

[18] When disregarding Agent Stoddard's failure to recognize the minivan, the court of appeals assumed (Pet. App. 14a-15a, 17a-18a) that campers, hikers, bikers, picnickers, and tourists commonly take the same route as respondent. Yet the district court found (*id.* at 22a) that respondent was neither heading toward any nearby recreation area when he was stopped, nor taking a customary route to recreation areas located farther north. Those factual findings were binding on the court of appeals unless clearly erroneous, *Ornelas*, 517 U.S. at 699, and respondent did not challenge them in his appellate brief.

[19] The court of appeals stated that "Agent Stoddard did not explain the factual basis for" his belief that smuggling activity occurred in the area to which the minivan was registered. Pet. App. 16a. In fact, Agent Stoddard testified at the suppression hearing that he was aware that officers apprehended "several groups [of illegal aliens] * * * daily in that area attempting to get into stash houses and such." J.A. 67.

Respondent had slowed down sharply upon seeing Agent Stoddard's Border Patrol vehicle.[20] Respondent and his adult passenger both appeared nervous when they passed Agent Stoddard's truck, and the children engaged in four or five minutes of odd waving that seemed to be directed by the adults. Pet. App. 23a-25a; J.A. 35, 61.[21]

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[20] The posted speed limit on Rucker Canyon Road, at the intersection of Leslie Canyon Road, is 35 miles per hour. J.A. 83, 171. Later on respondent's route, the speed limit drops to 25 miles per hour. J.A. 179. Respondent, however, made no argument below that he slowed in order to avoid exceeding the speed limit when he passed Agent Stoddard's vehicle. Cf. *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992) ("[T]here is nothing suspicious about a *speeding* car slowing down after a marked patrol unit turns to follow.") (emphasis added). To the contrary, respondent's counsel consistently asserted that respondent never violated any traffic laws. J.A. 134; see also Resp. C.A. Br. 30 (arguing that respondent was engaged in "non-dangerous driving, which violate[d] no traffic laws" and noting that Agent Stoddard did not stop respondent for a traffic violation).

[21] The court of appeals mischaracterized the record when it suggested (Pet. App. 13a-14a) that Agent Stoddard relied on the mere facts that respondent failed to acknowledge him when driving past, and that the children waved. Agent Stoddard concluded from respondent's posture and behavior that he was nervous. *Id.* at 24a; J.A. 33, 59-60. That was indisputably relevant. See *Wardlow*, 528 U.S. at 124; *Sokolow*, 490 U.S. at 4, 6, 8, 9 n.4; see also Pet. 18 n.7 (citing court of appeals decisions). Likewise, the children's waving was relevant because (as the district court found after seeing Agent Stoddard imitate the children, see J.A. 35) it was done in a "methodical," "mechanical," and "abnormal way * * * without even turning around to look at the agent." Pet. App. 25a. The unusual manner of the waving led Agent Stoddard to suspect that the adults in the van were coaching the children. And the apparent coaching—not simply the waving—contributed to Agent Stoddard's suspicion. J.A. 35, 61, 73. See generally *Ornelas*, 517 U.S. at 699 (reviewing court should "give due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers.").

There appeared to be cargo on the floor of the van, where it could not be seen. Pet. App. 24a-25a. Yet respondent, whom Agent Stoddard did not recognize as a local driver, had already passed the turn-offs for local campsites and recreation areas, *id.* at 22a, and a driver making a long-distance trip for which luggage would be needed would be expected to use the highway to avoid a "40-mile trip at least, through a dirt road," *ibid.* As the district court aptly explained, the cargo on the floor of the minivan "[c]ould have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity." *Id.* at 25a.

Agent Stoddard appropriately "piec[ed] together the information at [his] disposal," *Cortez*, 449 U.S. at 419, including the absence of any facts negating his inferences about possible illegal activity. He correctly concluded, based on specific, articulable facts and reasonable deductions that reflected his training and experience, "that criminal activity 'may be afoot.'" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 30); see *Cortez*, 449 U.S. at 418. As the district court determined (Pet. App. 21a-25a), Agent Stoddard's decision to investigate further by stopping and questioning respondent was consistent with the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH ARVIZU,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals conducted appropriate review by correctly articulating this Court's Fourth Amendment principles, explicitly basing its decision upon those principles, carefully considering all of the facts and circumstances existing in this case, determining that the objective facts with their rational inferences did not have incriminatory weight, and expressly limiting its ruling to "stops such as the stop involved here."

2. Whether, under the totality of the circumstances in this case, the border patrol agent's suspicion was not reasonable because it was based upon subjective interpretations that were not supported by objective facts and reasonable inferences of criminal activity, but rather upon the agent's unexplained supposition that innocuous-appearing conduct describing large numbers of law-abiding citizens was suspicious.

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STATEMENT

1. On Monday, January 19, 1998, Martin Luther King Day, Ralph Arvizu was driving a minivan along Leslie Canyon Road, which leads north from the border city of Douglas, Arizona. His sister, Julie Arvizu, and her three children were passengers. J.A. 104. United States Border Patrol Agent Stoddard was on duty. He had been a border patrol agent for approximately fourteen months by that time. J.A. 18. This arrest was the agent's first narcotics smuggling arrest in this area.[1] J.A. 21, 56.

The van activated a sensor while on Leslie Canyon Road. At approximately 2:15 in the afternoon, the agent learned of the sensor hit. J.A. 24. Because the sensor does not detect border crossing activity, J.A. 51, the agent had no reason to believe the vehicle had recently crossed the border, only that it was traveling north along Leslie Canyon Road. Shortly afterward, a second sensor indicated the van had turned onto Rucker Canyon Road. J.A. 51. Agents typically learned of sensor hits every couple of hours in this area.[2] J.A. 57.

The van traveled along public unpaved roads: Leslie Canyon, Rucker Canyon, and Kuykendall Cutoff,[3] all of

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[1] The agent had only been on roving patrol "several times." J.A. 21.

[2] That means about 4300 cars travel these roads per year.

[3] The agent claimed the roads are normally traveled by four-wheel-drive vehicles and Kuykendall Cutoff Road was unsuitable for passenger vehicles because it is only maintained occasionally and there are washouts when it rains. J.A. 36, 63-64. But Kuykendall was well-maintained and none of the roads were restricted. J.A. 54, 80. The district court found it was a "road a vehicle sedan could travel on." Pet. App. 23a.

which accessed recreational areas in the Coronado National Forest and Chiricahua National Monument.[4] J.A. 54, 88-89, 157.

Although the agent admitted he was not "real familiar" with Chiricahua National Monument and knew only "that it exists in the area," he conceded it is a scenic location visited by many people. J.A. 52.

Kuykendall Cutoff is the natural route any Douglas resident would take to continue traveling north or northeast from Leslie Canyon Road. Leslie Canyon Road ends at Rucker Canyon Road and in order to continue northward one would have to travel along Rucker Canyon Road to Kuykendall Cutoff Road.[5]

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[4] Some of the destinations accessible along the route Arvizu traveled included: camping and picnic areas; houses, ranches, and schools; and several smaller settlements; J.A. 88-89. The area includes Chiricahua National Monument, which is popular amongst Douglas area residents. J.A. 89.

[5] See map, J.A. 157. There were many destinations along the route Arvizu traveled, even after the turn onto Kuykendall Cutoff Road, including the northern portion of Chiricahua National Monument, campgrounds in Turkey Creek, Onion Saddle, and Buena Vista Peak, and scenic locations such as Rock Canyon and Lookout Tower. J.A. 157. Kuykendall Cutoff Road is a shortcut for all motorists traveling northeast toward Willcox and New Mexico. J.A. 96. Thus, Arvizu's route of travel would not have been unusual for anyone traveling north or northeast. Petitioner's argument that vehicles turning right onto Kuykendall Cutoff Road would "circumvent the I-191 checkpoint and could proceed to cities such as Tucson or Phoenix," Pet. Br. 5, mistakenly assumes that all cars would turn west along I-10 toward Tucson and Phoenix, and not east toward Willcox or Lordsburg, or into one of the camping areas or picnic sites along the route.

The agent found 2:15 in the afternoon was significant because there is a 3:00 p.m. shift change when agents on roving patrol return to the checkpoint.[6] J.A. 26. But when agents return to the checkpoint for shift change depends upon how far they are away from it. J.A. 48-49. And, agents might use Leslie Canyon Road – the very road Arvizu was on – to return to the checkpoint at shift change. J.A. 49.

The agent drove along Rucker Canyon Road until he saw a minivan approaching from the other direction. J.A. 31. The agent waited for the van, by moving to the side of the road, along the shoulder, and turning his car to face Arvizu's van "at a slant," toward the middle of the road. J.A. 32.

The van slowed to approximately 25-30 mph, then turned right, onto Kuykendall, following a fork in the road. J.A. 32, 36. The agent was not using radar but guessed the van's original speed was 50-55 mph. J.A. 57. Arvizu's driving was not hazardous, did not obstruct traffic, and did not violate any traffic laws. J.A. 58. Although the agent did not recognize the van as belonging to a local resident, J.A. 37, he did not claim to recognize all the vehicles in the area and did not dispute that Douglas residents and tourists use the roads. The agent knew of an unrelated incident involving a minivan transporting marijuana in the same general area about one month earlier. J.A. 55-56. He claimed it was significant the vehicle was a Toyota minivan because they are

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[6] Shift changes occur three times per day. J.A. 47.

commonly used vehicles for smuggling,[7] J.A. 33, even though there was nothing at all unusual about it, such as obscured windows or the appearance of being heavily laden.

The agent testified Arvizu's posture was rigid, with both hands on the steering wheel, and Arvizu did not look at him and acted "as if he was ignoring me, trying to pretend I wasn't there." J.A. 33. The agent also claimed a passenger appeared "fairly uptight." J.A. 33-34. He claimed "[m]ost [law-abiding citizens in that area] look . . . [and] would give us a friendly wave." J.A. 59. To the agent, a rigid posture meant "they were trying to hide something." J.A. 60.

The agent observed the children in the back seat as the vehicle slowed from about 50 mph, throwing a dust trail so substantial he first noticed it half a mile away. J.A. 31. He saw their knees were "at seat level." J.A. 34. From this, he believed they were sitting as if their feet were resting on something, with their knees slightly higher than normal, but lower than chest level. J.A. 34, 60-61.

The agent followed the van. He testified that the children began waving at him. J.A. 35, 61. Although the agent had found it suspicious that the adults did not wave, he then became suspicious when the children began waving. J.A. 35, 61. The agent believed the children were waving at him even though they continued to face

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[7] According to the latest U.S. Census, the minivan is one of almost ten million minivans estimated to be registered to U.S. drivers in 1997. United States Census Bureau, *Statistical Abstract of the United States:* 2000, at 644.

forward, were motioning forward with their hands, and did not look at him. J.A. 35. He testified the waving was not normal and "it looked like they were instructed" to wave at him. J.A. 35, 61.

The vehicle signaled a turn onto Kuykendall Road "kind of early," briefly turned the indicator off, then turned it back on and turned. J.A. 36, 62. Driving from Rucker Canyon Road onto Kuykendall Road does not require a turn, but is a sharp right-hand fork or "T." J.A. 82, 165. The agent then checked the van's registration. It was not stolen, it had valid Arizona license plates, and it was registered to Leticia Arvizu at 403 4th Street in Douglas, Arizona. J.A. 37, 65-66. The agent labeled the 400 block of 4th Street in Douglas, Arizona as "one of the most notorious areas" for smuggling in the Douglas area. J.A. 38. Nothing suggested any illegal activity at the 4th Street address, with Leticia Arvizu, Ralph Arvizu, or the van. J.A. 66-67.

Nothing about the appearance of the van's occupants led him to suspect they were illegal aliens. J.A. 68. Nevertheless, he decided to stop the van to perform an immigration check on its occupants. J.A. 68. The van promptly stopped. J.A. 68. The agent found marijuana inside the van and arrested Arvizu.

2. Arvizu filed a motion to suppress the marijuana because the agent lacked reasonable suspicion to stop and detain the van. The district court denied the motion to suppress, finding the stop was lawful and identified ten factors that contributed to its decision. Pet. App. 21a-27a.

Arvizu pleaded guilty to Title 21, United States Code, § 841(a)(1), possession with the intent to distribute marijuana, J.A. 11, while reserving his right to appeal the denial of the motion to suppress evidence.

The court of appeals unanimously reversed, finding there was no reasonable suspicion to stop the van. See *United States* v. *Arvizu*, 232 F.3d 1241 (9th Cir. 2000). The opinion articulated and followed the legal principles this Court has set forth for assessing reasonable suspicion, *id.* at 1247-48 (citing *Sokolow*, *Terry*, *Cortez*, *Wardlow*, and *Brignoni-Ponce*),[8] then examined each factor and addressed the totality of the circumstances.

The court of appeals found that slowing down could not contribute to reasonable suspicion, absent other circumstances, *id.* at 1248, then ruled the opposite factors of failure to acknowledge and suspicious waving had no incriminatory weight in this case because, without special circumstances, they were too ordinary. *Id.* at 1249. Next, the court determined the remaining factors had such low probative value "that they have little or no weight under the circumstances," *id.* at 1249-51, or were relevant and "probative to *some* degree." *Id.* at 1251. After examining all of the circumstances, the court of appeals found there was no reasonable suspicion for the investigative stop.

[8] *United States* v. *Sokolow*, 490 U.S. 1 (1989); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Cortez*, 449 U.S. 411 (1989); *Illinois* v. *Wardlow*, 528 U.S. 119 (2000); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975).

After Petitioner requested rehearing, the panel added the words "in this case," to clarify that it had not created *per se* rules. *Id.* at 1244, 1248.

SUMMARY OF ARGUMENT

1. The Fourth Amendment is the only buffer between citizens and unlimited, unfettered law enforcement discretion. Not every suspicion is reasonable and some stops are unreasonable, as a matter of law, whenever no reasonable officer would rely on certain facts, either singly or in the aggregate, as a basis for making the stop. This simple truth is the basis of the opinion. The reasonable suspicion test is meaningful only when subjected to the neutral scrutiny of the courts. *Ornelas* v. *United States*, 517 U.S. 690 (1996), teaches that appellate courts should ultimately decide these questions. The court followed *Brignoni-Ponce*, *Cortez*, *Sokolow*, and *Ornelas* and examined the totality of the circumstances. Using common sense and logic, it found certain factors were suspicionless in this case and others had little weight.

Petitioner seeks a tautological test eviscerating the reasonable suspicion requirement. Petitioner would require each factor to have some incriminatory weight in the reasonable suspicion calculus and seeks a rubberstamp review, not a reasoned *de novo* review. Petitioner would provide law enforcement officials *carte blanche* to seize any individual traveling in the border region without meaningful judicial review.

2. The court of appeals correctly held there was no reasonable suspicion to stop Mr. Arvizu's vehicle. The

facts examined in the context of the totality of the circumstances objectively pointed to a family on a holiday outing in a recreational area, not to criminal activity. The agent offered no objectively reasonable grounds for his subjective beliefs. The factors the agent relied upon would describe a large number of law-abiding citizens and do not sufficiently narrow the stop-eligible class.

ARGUMENT

I. The Tautological Test the Government Seeks Is Unreasonable and Would Subject Innocent Persons to Random, Discretionless Stops.

A. The Fourth Amendment Protects Against Unfettered Police Discretion.

The Framers did not enact the Fourth Amendment to further the investigative powers of law enforcement officers but to curtail them. Its central purpose is the control of police discretion. Every vehicle stop this Court has decided since *Carroll* v. *United States*, 267 U.S. 132 (1925), requires a discretion-limiting feature, such as probable cause,[9] reasonable

[9] *Carroll*, 267 U.S. at 153-54, established the automobile exception, but tempered the exception with this observation: "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." Although law enforcement faced the enormous task of enforcing the Prohibition laws, this Court resisted pressure of "official expedience" against the Fourth Amendment. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 274 (1973).

suspicion,[10] or defined-purpose checkpoints.[11] Thus, individualized objective suspicion is the bedrock of protection against unjustified and arbitrary police action.[12]

This Court's precedent teaches that eliminating opportunities for unfettered police discretion is essential.[13] In criminal law, the reasonable suspicion standard

[10] *Terry*, 392 U.S. at 20-24, first allowed detentions without probable cause, holding officers may temporarily detain a person whom they reasonably suspect has committed or is about to commit a crime.

[11] See *United States* v. *Ortiz*, 422 U.S. 891, 895-96 (1975) (holding officers must have probable cause to search vehicles at checkpoints because checkpoints do not meaningfully limit the officer's discretion to select cars for search); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976) (ruling fixed-checkpoint stops are constitutional). *Cf. City of Indianapolis* v. *Edmond*, 531 U.S. 32, 41 (2000) (holding suspicionless drug checkpoints violated the Fourth Amendment, reasoning the interest in general crime control does not justify suspicionless stops).

[12] See *Delaware* v. *Prouse*, 440 U.S. 648, 661, 663 (1979) (extending the reasonable suspicion requirement to all automobile users, ruling officers cannot randomly stop automobiles to check the driver's license and automobile registration, thereby protecting automobile users from standardless and unconstrained government discretion).

[13] See *Chicago* v. *Morales*, 527 U.S. 41, 62 (1999) (striking down a Chicago ordinance as vague because its language was inherently subjective, resulting in unlimited discretion for officers to abuse their power); *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (striking down a California statute because it could result in "a standardless sweep").

divests officers of unlimited discretion. In particular, this Court has repeatedly recognized the intrusiveness of roving patrol stops and their potential for abuse.[14]

In order to fetter discretionary police intrusions upon individuals, this Court held in *Terry* that officers must "point to specific and articulable facts which, taken together with rational inferences from those facts, warrant the intrusion." *Id.* at 21. *Terry* responded to the tension between law enforcement interests and the Fourth Amendment, striking an appropriate balance.

Petitioner's brief invokes law enforcement interests, contending that this Court has long recognized the "formidable law enforcement problems" along our border with Mexico and the difficulties of patrolling the border. Pet. Br. 3 n.2. The government has repeatedly tried to persuade this Court to carve a border exception allowing roving patrols to perform suspicionless, discretionary vehicle stops and this Court has repeatedly declined to do so, tempering its recognition of the difficulties faced by law enforcement with the requirement of reasonable suspicion followed by independent judicial review.

In *Almeida-Sanchez*, 413 U.S. at 268, the government sought to dispense with the probable cause requirement for automobile searches within one hundred miles of the border. This Court refused and held roving border patrol

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[14] See *Ortiz*, 422 U.S. at 891, 895-96; *Martinez-Fuerte*, 428 U.S. at 559; *Prouse*, 440 U.S. at 657 (finding that both random and roving-patrol stops involve officers signaling a vehicle to pull over "by means of a possibly unsettling show of authority," interfere with freedom of movement, are inconvenient, time-consuming and may create "substantial anxiety").

agents cannot search automobiles for illegal aliens without probable cause or consent to search. *Id.* at 266. This Court commented that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of individuals against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." *Id.* at 273.

In *Brignoni-Ponce*, 422 U.S. at 876-78, the government again sought unlimited and unbridled discretion for border patrol agents to stop vehicles. This Court ruled agents must have reasonable suspicion for roving-patrol stops, *id.* at 881-82, and the reasonable suspicion standard "allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference," *id.* at 883.

In *Cortez*, this Court again recognized the difficulties of patrolling border areas, but nevertheless emphasized the need for specificity of information. *Cortez*, 449 U.S. at 411. Although agents may assess facts in light of their experience, hunches or instincts cannot support reasonable suspicion. *Id.* at 418-19. Reasonable suspicion depends upon the content of information and its degree of reliability – both quantity and quality are important; and, although their background provides a backdrop to assess the relevant facts, agents must draw objectively reasonable inferences. *Id.* at 418.

Thus, this Court continues to reject the government's attempts to secure unbridled discretion to stop motorists in border areas. Yet, the real thrust of Petitioner's argument is to limit appellate review of police conduct.

B. The Reasonable Suspicion Test Requires an Objective and Rational Basis for any Intrusion on Liberty.

Probable cause means a "fair probability that contraband or evidence of a crime will be found"; reasonable suspicion is a less demanding standard. *Sokolow*, 490 U.S. at 7 (internal citations omitted). Reasonable suspicion is less than a preponderance of the evidence, *id.*, but more than an unparticularized suspicion or hunch, *Terry*, 392 U.S. at 27. This Court has characterized it as a relatively simple concept " 'not readily reduced to a neat set of legal rules.' " *Sokolow*, 490 U.S. at 7 (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). But the lack of neat legal rules does not mean that reasonable suspicion is impossible for a court to apply. Courts must ensure that reasonable suspicion determinations are based on rational, common-sense judgments and inferences about human behavior. *Wardlow*, 528 U.S. at 124-25. The Fourth Amendment demands accountability by those making decisions in the field. Officers must offer objectively reasonable explanations for seizing individuals. Particularized proof serves the dual functions of constraining police discretion and facilitating judicial review of police decisions. Not only must a factor objectively single out a person from the general law-abiding population, there must be a nexus between the observations and the suspicion of criminal activity. Observations of neutral and common facts do not meaningfully narrow the stop-eligible class in any way.

Although reasonable suspicion eludes precise definition, its essence is an examination of the totality of the

circumstances – looking at the whole picture.[15] *Cortez*, 449 U.S. at 417. First, courts examine whether officers have made objective observations and whether there are rational inferences to be drawn from those facts. Second, assessment of the whole picture must yield a particularized suspicion that the individual being stopped is engaged in wrongdoing. If the test is, as Petitioner advocates, that anything an officer says is sufficient, then there can be no deterrence of police action, no matter how arbitrary or abusive.

This Court has provided guidance for evaluating reasonable suspicion and assessing the weight of various factors. Courts must examine the totality of the circumstances, including behavior "quite consistent with innocent travel." *Sokolow*, 490 U.S. at 9. Courts must also consider "the degree of suspicion that attaches to particular types of non-criminal acts," *id.* at 10, and require " 'some minimal level of objective justification' for making a stop," *id.* at 7 (citations omitted). Sometimes, the degree of suspicion that attaches to conduct may be so low that no reasonable officer would rely on that fact, singly or in combination with other facts, in deciding to

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[15] *Brignoni-Ponce*, 422 U.S. at 884-85, set forth a non-exhaustive list of factors for agents to consider: (1) characteristics of the area; (2) the agent's previous experience with criminal activity; (3) proximity to the border; (4) unusual traffic patterns; (5) information about recent smuggling in the area; (6) the driver's behavior; (7) the vehicle's appearance; and (8) the number, appearance, and behavior of the passengers. The opinion did not set forth a minimum number of factors necessary for reasonable suspicion or any outcome-determinative criteria.

make an investigatory stop. This Court has determined that certain facts, standing alone, are always insufficient to support reasonable suspicion, such as presence in a high-crime neighborhood, *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), and apparent Mexican ancestry, *Brignoni-Ponce*, 422 U.S. at 885-87. While Petitioner's brief discusses innocent conduct, Pet. Br. 25-26, it ignores that something more than an innocent factor – experience or an inference – must point to the suspect and to criminal conduct. Purely subjective hunches or purely innocuous conduct cannot provide reasonable suspicion.

This Court's cases upholding reasonable suspicion determinations exemplify the type of careful observation and objective inferences necessary to support a stop. The conduct in *Terry* may have been "ambiguous" and "susceptible of an innocent explanation" but it pointed to illegal activity. The officer had thirty years of experience patrolling downtown Cleveland. He carefully watched Terry and a companion, two men he had never seen before, while they took turns repeatedly looking into a store window (approximately 24 times), conferring with each other after each time. Although the officer suspected a "stick-up," he waited and followed the men as they joined a third man with whom they had earlier conferred. Only then did the officer approach the men and ask their names; when they mumbled a response, he patted down Terry, finding a pistol. *Terry*, 392 U.S. at 5-7. Objectively reasonable facts implicated the men in criminal activity and failure to further investigate would have been "poor police work indeed." *Id.* at 23. *Terry* involved good police work – surveillance, investigation, and connecting the dots.

Cortez is an example of very good police work. Agents followed distinctive "chevron" footprints on numerous occasions, deducing "chevron" was an alien smuggler; they identified a nearby load site and deduced a pattern of transport; then they stopped a pickup with a camper which they believed "chevron" might be driving and which had made an early morning round trip in the area. *Cortez*, 449 U.S. at 412-14. This Court ruled that the agents had reasonable suspicion for the stop, that courts should take into account all of the circumstances, and that there must be a particularized showing that this person is engaged in wrongdoing. *Id.* at 418-19.

And, in *Sokolow*, the circumstances were more than merely unusual, they were also suspicious of criminal activity when viewed in context. This Court examined reasonable suspicion based upon a combination of factors, including a drug courier profile and other evidence casting particularized suspicion upon defendant. Agents stopped Defendant in a Hawaii airport, relying upon these factors: Defendant had just returned from a three-day trip to Miami, a source city for drugs; he paid for his $2100 ticket with a large wad of twenty-dollar bills; he did not check any luggage; he changed planes; he dressed in a black jumpsuit and wore a lot of gold jewelry; and he apparently used an alias (Sokolow's telephone number was listed under another person's name). Also, Defendant appeared nervous and was looking all around the waiting area during a layover in Los Angeles. *Sokolow*, 490 U.S. at 3-5. Although each of the factors did not, standing alone, prove illegal conduct and were consistent with innocent travel, in sum they provided reasonable

suspicion because some factors pointed to criminal activity, such as using an alias and purchasing the tickets with 105 twenty-dollar bills. *Id.* at 8-9.

Thus, it was objectively reasonable for the officers in *Terry*, *Cortez*, and *Sokolow* to suspect criminal activity and temporarily detain the suspects because objective facts and rational inferences drawn from those facts focused suspicion of criminal activity upon the individuals. The net was not so broad as to sweep in ordinary citizens.[16] But there is no reasonable suspicion when officers rely upon hunches or generalized facts describing a large number of innocent people.

In *Reid* v. *Georgia*, 448 U.S. 438 (1980), this Court ruled there was no reasonable suspicion for the airport stop of a traveler, because the factors the agent relied on described a large number of "presumably innocent travelers, who would be subject to virtually random seizures" were the Court to find reasonable suspicion for the stop.[17] *Id.* at 441. This Court did not accept the agent's subjective

[16] Compare *Brown*, 443 U.S. at 52 (presence of a suspicious-looking man in an alley in neighborhood notorious for drug trafficking does not furnish reasonable suspicion). Thus, requiring specific, articulable facts for stops does not give officers free rein to act on their own suspicions.

[17] The factors included: arrival from Fort Lauderdale, a cocaine source city; early morning arrival, when law enforcement activity is diminished; the travelers appeared to be trying to hide the fact they were traveling together; defendant traveled ahead, occasionally looking back toward his companion; and they carried no luggage except shoulder bags. *Id.* at 440-41.

belief as a rational inference, finding "as a matter of law" that:

> [t]he agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an "inchoate and particularized suspicion or 'hunch,' " than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case.[18]

Id. at 441 (internal citation omitted).

C. Plenary Appellate Review Ensures *Terry*'s Protections Remain Meaningful.

Because even a limited search is a severe intrusion, the reasonable suspicion determination is meaningful only when "the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of the particular search or seizure in light of the particular circumstances." *Terry*, 392 U.S. at 21. Petitioner would have courts of appeals ignore the context in which they receive cases.

[18] Similarly, *Florida* v. *Royer*, 460 U.S. 491, 497-98 (1983), held when there is no reasonable suspicion, a person may refuse to cooperate, ignore the police, and go about his business. One Justice found that the facts "considered individually or collectively . . . are perfectly consistent with innocent behavior and cannot possibly give rise to any inference supporting a reasonable suspicion of criminal activity." *Id.* at 512 (Powell, J., concurring).

In *Ornelas*, this Court established a *de novo* standard of review for reasonable suspicion and probable cause issues. Independent *de novo* review is necessary for appellate courts to maintain control of and clarify legal principles, guide police, and unify precedent:

> *de novo* review tends to unify precedent and will come closer to providing law enforcement officers with a defined " 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' "

Ornelas, 517 U.S. at 697-98 (internal citations omitted). The opinion noted this Court has never expressly deferred to the trial court's determination when reviewing reasonable suspicion. *Id.* at 697. Moreover, the opinion warned:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [t]o tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law. This, if a matter-of-course, would be unacceptable.

Id. at 697 (internal citations omitted). After noting the problems inherent in treating similar facts differently, this Court concluded that "[i]ndependent review is necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.* Thus, appellate opinions

should guide lower courts in order to provide consistency.

Although the reasonable suspicion inquiry is so fact-specific that " 'one determination will seldom be a useful precedent for another,' " *id.* at 698 (internal citation omitted), there are exceptions, such as *Sokolow* and *Royer*. And, even where one case does not control another, multiple decisions add to the applicable body of law. *Id.* Because courts of appeals have uncovered abusive patterns, their opinions offer guidance for future encounters.

Although *Ornelas* instructs courts of appeals to review findings of historical fact for clear error and to give due weight to inferences drawn from those facts by local judges and law enforcement officers, *id.* at 699, deference is not blind: an officer's perceptions must be reasonable under an objective standard. Inferences about why observed facts create suspicion of wrongdoing must be rational.

The courts of appeals can best monitor law enforcement operating along the border. Because districts vary in the number and types of cases they hear, any one district court will not hear a large number of Fourth Amendment cases, will not encompass a large geographic area, and cannot monitor potential patterns of abuse. Because courts of appeals take mandatory appeals on a circuit-wide level, they hear cases in far greater numbers than any one district court and, therefore, are in a unique position to monitor and halt abuses of power. They review both good police work, upholding appropriate

law enforcement techniques, and poor police work, striking down improper and discretionless stops. Only appellate courts can meaningfully prevent unreasonable police practices.[19]

Petitioner seeks to undermine *de novo* review. By criticizing the court of appeals' approach of determining whether a reasonable officer would rely on a particular fact, the government seeks to erode this Court's requirement of particularized suspicion for investigatory stops.

Petitioner wants past abuses, even when repeated, to become merely history, not precedent. Thus, Petitioner criticizes the court of appeals for recognizing when factors have been repeatedly abused in a "heads I win, tails you lose" manner. Yet this analysis is essential to the circuit court's role in determining whether it is reasonable to rely on certain facts under the totality of the circumstances in any given case. Although Petitioner insists courts give officers the benefit of their experience, it apparently does not want appellate judges to benefit from theirs. Petitioner's argument would allow officers to stop vehicles in a standardless and unconstrained manner, eviscerating reasonable suspicion and expanding the powers of law enforcement.[20]

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[19] No one can dispute that border patrol agents sometimes stop innocent drivers. See *Almeida-Sanchez*, 413 U.S. at 273 n.5. As the number of border patrol agents increases, the stops of law-abiding citizens will only increase.

[20] *Brent* v. *Ashley*, 247 F.3d 1294 (11th Cir. 2001), is an alarming example of how unfettered discretion can lead to abuse of innocent citizens' rights. An African-American woman arrived in Miami after a trip to Nigeria. When she shook her head disapprovingly at customs officials searching the luggage of the only other black passenger, they decided to detain her for further inspection. *Id.* at 1297. Agents claim she fit a smuggling profile: her ticket was purchased with a friend's credit card from the same travel agency as the other black passenger's; she wore inexpensive clothes; she was nervous; and she became agitated when confronted. *Id.* Female agents conducted a body pat-down and strip search by ordering her to pull down her clothes, removing and examining her sanitary napkin, and squeezing her abdomen. *Id.* at 1298. When she asked to use the bathroom, an agent watched her and told her not to flush the toilet. *Id.* A TECS search revealed no negative information. *Id.* Despite finding no signs of contraband, agents transported her to a hospital for an x-ray and pelvic exam. *Id.* The report indicated the reasons for the search were her nervousness and arrival from a source city. *Id.* at 1297. She signed a consent form after being told she could be detained up to 35 days if she refused. *Id.* at 1298. The examinations revealed no contraband. *Id.* The Eleventh Circuit found the agents lacked reasonable suspicion. *Id.* at 1302. Although the appeal was from a summary judgment order and there were disputed facts, it is undisputed that the woman was *not* smuggling drugs. *Id.* at 1298.

Plenary review is appropriate where there is a need for uniformity across cases or when issues are so important that there is a need to review the first-line decision-maker. Using an objective standard allows police to determine in advance whether their conduct implicates the Fourth Amendment. *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). Thus, uniformity gives officers clear guidance in the field.

A sacrifice in freedom inevitably flows from any expansion of unreviewable law enforcement powers. The reasonable suspicion standard should not be turned into

a police suspicion standard.[21] Without independent judicial review the reasonable suspicion standard would be meaningless.

Ever since its inception, the exclusionary rule has been recognized as a principal mode of discouraging lawless police conduct. 4 Wayne R. LaFave, *Search and Seizure* § 11.4(j), at 459-60 (2d ed. 1987). *Ornelas* teaches that appellate courts ultimately make these determinations. *Terry*'s command is that conduct, to be reasonable, must pass muster under objective standards applied to specific facts; *Ornelas* enforces it.

D. The Court of Appeals Correctly Followed Applicable Law and Conducted a Thorough Review.

The court of appeals followed this Court's precedent, reaching a conclusion only after considering all of the facts. It expressly limited its analysis to the facts of "this case" and to "stops such as the stop involved here,"

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[21] The problem with this approach is obvious. "Just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area. . . . Police are trained to detect criminal activity and they look at the world with suspicious eyes. This is a good thing, because we rely on this suspicion to keep us safe from those who would harm us. But to rely on every cop's repertoire of war stories to determine what is a 'high crime area' – and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion – strikes me as an invitation to trouble." *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring).

thereby confirming that it had not created any *per se* rules. *Arvizu*, 232 F.3d at 1248.

The court correctly recited this Court's standards for reasonable suspicion, including: there must be "articulable facts that criminal activity may be afoot" (citing *Sokolow* and *Terry*), emphasizing that while "we must take into account the totality of the circumstances" (citing *Sokolow* and *Gates*), "inchoate and unparticularized suspicions and hunches" do not furnish reasonable suspicion (citing *Wardlow);* and "reasonable suspicion exists only when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion," meaning that "*the particular person being stopped* has committed, or is about to commit a crime." *Arvizu*, 232 F.3d at 1247.

The opinion correctly recited *Sokolow*, recognizing that courts may properly consider "conduct that may be entirely innocuous when viewed in isolation" in assessing reasonable suspicion. *Id.* at 1247. Nevertheless, there must be "other information or surrounding circumstances of which the police are aware, considered together with the otherwise innocent conduct" to provide a sufficient basis to suspect criminal activity. *Id.* at 1248.

The court correctly stated that officers are always entitled to assess the facts in light of their experience, *id.* at 1247 (citing *Brignoni-Ponce*), and that "an officer's experience may furnish the background against which the relevant facts are to be assessed, as long as the inferences he draws are objectively reasonable," *id.* at 1248.

The court also recognized that some factors "have so little probative value that no reasonable officer would rely on them in deciding to make an investigative stop." *Id.* at 1247. Without this, *Terry*'s protections are meaningless.

Then, the court explained how it evaluated this case:

> In reaching our conclusion, we find that some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion.

Id. at 1248. The court's unequivocal language "in this case" limits its rulings to these facts.

Although the opinion states that slowing down is "squarely prohibited by our precedent," the court explains the factor is not categorically prohibited, but needs something more to make it suspicious, such as evasive or erratic driving. *Id.* The court next ruled that Arvizu's failure to acknowledge the agent had little or no incriminating weight absent "special circumstances," and the children's waving had no such weight, in light of the contradictory inferences drawn from the border patrol's repeated use of opposite factors. *Id.* at 1249. The court also determined that other factors (the previous stop of a minivan, the officer did not recognize this minivan, registration to an address in a neighborhood notorious for smuggling, and the children's knees were slightly raised) carried little or no incriminating weight "absent other circumstances." *Id.* at 1249-50. In other words, the factors had so little rationally incriminating weight under the circumstances of this case that a reasonable officer could

not have relied upon them in making a stop. Thus, Petitioner's argument that the opinion "eliminated seven different facts . . . from the reasonable suspicion calculus 'as a matter of law,' . . . without limiting its exclusions to this one case," Pet. Br. 21, is simply wrong.

Petitioner also claims the court considered the three "relevant" factors in isolation and "disaggregated" factors the agent deemed collectively significant, turning isolated facts into a series of hurdles. Pet. Br. 12, 31. This is not so. For example, the fact of not recognizing a minivan, when an area is known for recreation and tourism, shows how the court of appeals placed an isolated fact in the context of all of the circumstances and determined from the totality of facts that it was not suspicious of criminal activity. Although Petitioner admits that reasonable suspicion is "inherently contextual," Pet. Br. 13, 19, it objects when the court of appeals fits the agent's observations into their context, and determines they are not suspicious. In Petitioner's view, reviewing courts should consider only the totality of facts the agent deemed significant, not the whole picture.

When the court of appeals reviewed the remaining three factors (smugglers sometimes use the road, smugglers have used minivans, and shift change), it did not do so in isolation but in the context of all of the circumstances. The court determined that, although they had some level of suspicion, and thus were probative "to *some* degree," they did not furnish reasonable suspicion, "either singly or collectively." *Arvizu*, 232 F.3d at 1251.

The opinion did not categorically prohibit any factor. It determined, based on this Court's teachings, that ordinary, innocuous facts, without more, do not provide particularized suspicion of criminal activity. There must be another circumstance or something in light of the officer's experience, but it must be more than a hunch. For example, slowing down upon seeing a marked patrol car, without something more, is not at all indicative of criminal activity. *Id.* at 1248-49. Petitioner mischaracterizes the opinion by saying it "deemed only three factors relevant to reasonable suspicion analysis." Pet. Br. 12. The court did not create *per se* rules but found, in this case, that certain factors lacked any suspicion, given the circumstances.

The court's review of the entire record directly contradicts Petitioner's claim that it fashioned *per se* rules. The language "as a matter of law," "in this case," "under the circumstances," and "absent other circumstances" is shorthand for the painstaking *de novo* review the court of appeals conducted, carefully examining the tapestry of facts, observations, and suppositions.

Similarly, Petitioner complains the opinion creates "specific" rules that are "too numerous and too complicated for officers to apply when they make the split-second decision whether to stop." Pet. Br. 13. Petitioner overlooks that the opinion, just as *Ornelas* teaches, offers guidance, instructing that officers must explain the objective bases of their inferences of criminal activity. While *Terry* street encounters may often involve split-second decision-making, the vehicle stop here was not based on such rapid determinations. The agent did not wait for

reasonable suspicion to develop, but instead acted upon his subjective impressions.

Petitioner wrongly characterizes the opinion as departing from the totality of the circumstances approach and as "suggesting" that some types of activity should be excluded from the reasonable suspicion inquiry, such as activities that are almost always innocent, factors inviting subjective application by officers, and factors placing groups of law-abiding citizens at a heightened risk of being stopped. Pet. Br. 24-25. This oversimplifies the opinion. The court of appeals followed this Court's precedent and reached legal conclusions only after considering all of the facts. This is nothing more than the *de novo* review *Ornelas* requires.

The court searched the record for the objective facts and rational inferences of criminal activity that *Terry* requires, but found none. The agent merely reported his subjective impressions and facts that did not give rise to rational inferences of wrongdoing. Missing was testimony about how the observed behavior, in the agent's experience, correlated with criminal conduct. The factors the agent relied upon fail because they do not indicate criminal activity. The record does not place the agent's observations in a context that demonstrates why the observations reasonably led to suspicion. These are the "other circumstances" the court of appeals found were lacking.

Agents cannot merely list their observations because reasonable suspicion "is not a numbers game." *Arvizu*, 232 F.3d at 1247 n.8. This common-sense observation reflects the teachings of *Terry* and *Ornelas*.

The probative force of the inferences drawn from the factors the agent offered to support the stop is a function of all of the circumstances, not just the ones the agent mentioned. The court of appeals conscientiously considered everything. But it did not attribute incriminatory weight to everything the agent observed. Instead, the court followed this Court's *Terry* analysis, critically analyzing whether the agent's inferences and suppositions were objective and rational, and examined each factor in the context of *all* of the facts. The court followed *Ornelas* by thoroughly analyzing each factor in light of its experience with similar cases, determining several factors failed to contribute to reasonable suspicion – either singly or collectively, in this case.

The court of appeals' approach in *Arvizu* was not novel. The *Arvizu* opinion falls squarely within this Court's jurisprudence. Following this Court's instruction, the Ninth Circuit declines to find reasonable suspicion when agents present subjective, rote, and contradictory factors[22] and upholds stops when agents present objective and rational factors and inferences that point towards criminal activity.[23] The "library analysis" the government complains of, Pet. Br. 24, is nothing other than common-sense analysis.

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[22] See, *e.g.*, *United States* v. *Garcia-Camacho*, 53 F.3d 244, 249 (9th Cir. 1995); *United States* v. *Jiminez-Medina*, 173 F.3d 754 (9th Cir. 1999).

[23] See, *e.g.*, *United States* v. *Michael R.*, 90 F.3d 340 (9th Cir. 1996); *United States* v. *Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994).

In 1979, then Judge Kennedy criticized a stop, based on rote and contradictory factors, and did so using a common-sense approach which examined the component factors:

> It is an innocuous circumstance that two vehicles are traveling in tandem on a hot summer day, one with a child in the front between two adults in bucket seats. . . . The failure of the occupants to look at the agents adds little to the case in light of the questionable value of the factor generally, the reliance in other cases on the fact that the suspect did look at the agent, and the testimony of the agent that he considered it suspicious that Ortiz did watch him in the rear view mirror.

United States v. *Munoz*, 604 F.2d 1160, 1161 (9th Cir. 1979). One need only peruse Fifth, Ninth, and Tenth Circuit opinions to discern oft-repeated factual patterns; therefore, precedent guides both officers in the field and district courts. Petitioner wrongly suggests that reasonable suspicion cases cannot be useful precedent. Pet. Br. 23.

Echoing this Court's teachings in *Ornelas*, 517 U.S. at 697-98, the court of appeals emphasized the need for guidance, noting that "no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it." *Arvizu*, 232 F.3d at 1248. The opinion did not suggest, as Petitioner claims, that "contextual application" of the reasonable suspicion standard results in too much uncertainty. Pet. Br. 13. Instead, the court carefully reviewed and synthesized previous cases

and examined all of the facts in order to issue an instructive opinion.[24]

The Ninth Circuit's approach is consistent with its sister border circuits, the Fifth[25] and Tenth Circuits.[26] In

[24] The Ninth Circuit's approach is consistent with the role *Ornelas* defined for appellate courts. Indeed, the Ninth Circuit's statements that multi-factored balancing tests can introduce uncertainty, *Arvizu*, 232 F.3d at 1248, reflects the same concern this Court expressed about "varied results" in *Ornelas*, 517 U.S. at 697, and is not in any way a rejection of the totality of the circumstances test. Consistent with providing guidance to "unify precedent" and to provide officers with a "defined set of rules" which apply in "most instances," as discussed in *Ornelas*, *id.* at 697-98 (internal quotes and citations omitted), the Ninth Circuit sought to "describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops *such as the stop involved here.*" *Arvizu*, 232 F.3d at 1248 (emphasis added). Far from creating *per se* rules, the Ninth Circuit went out of its way to announce that its analysis was limited to the facts of "this case" and was to provide guidance for future encounters.

[25] See, *e.g.*, *United States* v. *Jones*, 149 F.3d 364, 368 (5th Cir. 1998) (finding no reasonable suspicion where several factors were too common to be suspicious, ruling factors consistent with smuggling will not support reasonable suspicion if they occur even more commonly among law-abiding citizens – a common sense observation); *United States* v. *Escamilla*, 560 F.2d 1229, 1232-35 (5th Cir. 1977) (conducting analysis similar to the Ninth Circuit's analysis here, finding certain factors deserve no consideration and it would take "mental gymnastics" to find reasonable suspicion).

[26] See, *e.g.*, *United States* v. *Salzano*, 158 F.3d 1107, 1111-15 (10th Cir. 1998) (finding no reasonable suspicion; ruling "some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous;" individually examining each of the enumerated factors; and noting "[a]lthough the nature of the totality of the circumstances test

fact, most circuits have engaged in analyses that are similar in whole or in part, including criticism of the use of rote and contradicting generalized factors.[27]

Petitioner complains that the ever-increasing body of judicial precedent regarding investigative stops burdens officers, who should not be expected to recall so many cases, Pet. Br. 23-24, but also complains about this opinion, which usefully synthesizes past cases into an instructive opinion. In doing so, Petitioner overlooks this Court's admonition in *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978):

> [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Similarly, Petitioner argues the opinion would leave officers having to "guess about what degree of suspicion would exist in the absence of the forbidden fact." Pet. Br.

makes it possible for individually innocuous factors to add up to reasonable suspicion, it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation"); *United States* v. *Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (outrightly rejecting wholly innocent factors that do not suggest criminal activity at all, such as fast food wrappers and maps).

[27] See, *e.g.*, *United States* v. *Bayless*, 201 F.3d 116, 133-34 (2nd Cir. 2000) (finding reasonable suspicion but cautioning that factors vary in their weightiness); *Karnes* v. *Skrutski*, 62 F.3d 485, 496 (3d Cir. 1995) (ruling a combination of wholly innocent factors cannot combine into reasonable suspicion, unless there are concrete reasons for such an interpretation).

24. This is wrong. The opinion eliminates guesswork because it instructs. *Ornelas* clearly explains that lack of guidance creates confusion and leaves both officers and courts guessing.

Petitioner's position, followed to its logical end, is tantamount to giving officers unlimited discretion by prohibiting courts from carefully reviewing investigative stops. Petitioner's brief seeks indirectly what it has failed to obtain directly – unfettered discretion for roving patrols to stop vehicles in border areas. Petitioner seeks a tautological test. But this would eviscerate *Terry*'s reasonable suspicion requirement. Under Petitioner's argument, all reasons agents offer are entitled to incriminatory weight, no matter how empty of objectivity and rationality. Petitioner's approach is unreasonable and would give field officers unfettered discretion and courts no meaningful way to guide agents as to what is reasonable. Petitioner's approach would not allow courts of appeals to conduct a thorough, plenary review or to individually consider each factor to determine whether, together, they provide reasonable suspicion. The "unrealistic second guessing" Petitioner complains about is simply plenary review holding officers to no less and no more than reasonable suspicion. Petitioner's argument is contrary to *Terry* and *Ornelas*, which require police to have reasonable suspicion and courts to independently and carefully review their claims.

II. The Court of Appeals Correctly Determined that, Without More, the Factors the Agent Offered Were Not Objectively Suspicious and Did Not Cast Particularized Suspicion Upon Arvizu.

The facts are essentially undisputed. Yet, the facts do not objectively give rise to inferences of criminal activity. The court of appeals conscientiously examined each fact in the context of the totality of the circumstances and determined there was no reasonable suspicion. Although Petitioner wants each factor to have incriminatory weight, the court of appeals ruled that some factors merited no consideration, and others merited little. While the government focuses upon quantity, the court of appeals focuses upon quality.

In this case, the rational inferences based on the objective facts indicated only a family in a minivan on a holiday outing, not criminal behavior. The government merely repeats the agent's recitation of a number of observations and his subjective determinations and does not explain how the facts the agent observed rationally pointed to suspicion of criminal activity. The court of appeals examined everything in determining the agent's suspicion was not reasonable.

Route of travel/checkpoint evasion

The opinion correctly ruled this factor carried some suspicion, but was only of moderate significance in this case.

Although Petitioner claims the route Arvizu traveled would have added forty or fifty miles to the trip and was

not the most direct route to northwest destinations, a glance at the map (J.A. 157) shows the route was a short-cut from Douglas to many destinations (including campground and picnic areas along the northern part of Chiricahua National Monument, all destinations northeast of Douglas, and eastbound I-10 travel). Moreover, even if it were not shorter in time or distance, motorists need not take the quickest route of travel to a given destination and avoid a scenic route, or else risk a stop, interrogation, and search.[28]

The turn onto Kuykendall was the natural path to take for anyone traveling north along Leslie Canyon. For such travelers, passing through the checkpoint would have been unusual and out of the way.

The road's use by smugglers is not particularized to Arvizu and any road in Southern Arizona could be and has been so characterized.[29] Moreover, an individual may choose not to submit to a checkpoint inspection. See *Martinez-Fuerte*, 428 U.S. at 549. This Court has consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. *INS* v. *Delgado*, 466 U.S. 210, 216-17 (1984); *Royer*, 460 U.S. at 498; *Brown*, 443 U.S.

[28] The Fifth Circuit found that "it simply is not unusual that the particular route chosen by a driver does not coincide with a route border patrol agents consider more direct or common." *Escamilla*, 560 F.2d at 1232.

[29] The Fifth Circuit has repeatedly held that merely being on a road frequently used for illegal activity cannot justify a stop, since that would include virtually all roads along the Texas-Mexico border. See, *e.g.*, *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992).

at 52-53. Petitioner's argument that Arvizu did not take the fastest available route also fails because it ignores an individual's right to travel.[30]

Shift change

The opinion correctly found this factor carried some level of suspicion but was of little probative value, especially without other factors showing evasive behavior. This common-sense conclusion follows *Reid*, which rejected agents' claims that an early morning arrival was suspicious because it coincided with diminished law enforcement activity. Just as it is unreasonable to characterize early morning flights as suspicious, it is unreasonable to characterize traveling from Douglas, Arizona through an adjacent recreational area at 2:15 p.m., in broad daylight, as suspicious.[31] Yet the agent paired this time with the 3:00 p.m. shift change, which he claimed smugglers use to avoid border patrol. This conclusion makes no sense given that agents might use Leslie Canyon Road to return to the checkpoint, making the route more likely to draw the attention of border patrol. Also,

[30] The right to travel has been firmly embedded in this Court's jurisprudence for more than a century. See *Saenz* v. *Roe*, 526 U.S. 489, 498 (1999). See also *United States* v. *Lopez*, 564 F.2d 710, 713 (5th Cir. 1977) ("We would have thought it obvious that citizens may leave their state or county without having their purposes questioned.").

[31] See *United States* v. *Hernandez-Alvarado*, 891 F.2d 1414, 1419 (9th Cir. 1989) (Alarcon, J., concurring) (noting Border Patrol agent considered traveling in the morning suspicious because "drug smugglers travel at that time to *blend in* with the work force") (emphasis added).

the fact that Arvizu was traveling in the area forty-five minutes before shift change undermines any rational inference he was trying to avoid the border patrol. Petitioner would have area residents not travel anywhere within one hour of shift changes, some six hours per day, lest their activities be interpreted as suspicious.[32]

Minivans are used by smugglers.

The opinion correctly found this factor carried some level of suspicion but was of little probative value in this case. It would be difficult to find a make or model of vehicle that has not been used for smuggling.[33] Smugglers prefer whatever vehicle is roomy enough to hide aliens or contraband. Case law abounds with vehicle descriptions preferred by smugglers – Chevrolets, Fords, vans, trucks, Suburbans, and vehicles with roomy

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[32] See *United States* v. *Moreno-Chaparro*, 180 F.3d 629, 633 (5th Cir. 1999) ("we are not willing to sacrifice the constitutional protections of drivers to lessen the perceived adverse impact resulting from the decision of the Border Patrol to change shifts at the same time every day").

[33] See *Salzano*, 158 F.3d at 1107-12 (dismissing the kind of vehicle used as a factor because large quantities of drugs can be, and have been, hauled in vans, U-Hauls, tractor trailers and any large vehicle, and because there was no evidence the vehicle appeared heavily loaded or had been modified in any way); *Karnes*, 62 F.3d at 495 (finding argument that smugglers use mid- to full-size, average-looking cars to "blend in" turns notion of reasonable suspicion "on its head" by using factors that make the person searched look more like an ordinary, innocent person).

trunks.[34] Because minivans are one of the most popular family cars, this factor adds little, if nothing, to the equation, particularly if, as the court of appeals concluded, the vehicle did not appear to be heavily weighted, the absence of which negated suspicion here.

Another minivan containing marijuana was stopped within the last month.

The opinion correctly ruled this factor was of such low probative value that no reasonable officer would have relied upon it. Different agents had stopped one minivan containing marijuana along the same route one month earlier. As the court of appeals ruled, a single previous stop of a similar vehicle cannot taint all minivans – another common-sense observation. Rather than create a *per se* rule, the court of appeals noted that the result could have been different if the totality of the circumstances had provided "more than a single, isolated incident." *Arvizu*, 232 F.3d at 1249. This factor does nothing to suggest criminal activity in this case or to cast particularized suspicion on Arvizu.

The minivan slowed when it approached the agent's vehicle.

The opinion states this factor "is squarely prohibited by our precedent" because the agent observed no evasive,

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[34] Adding together only the vehicles that the Census Bureau classified as either pickup, minivan, panel or van, utility vehicles, and station wagons yields a total of 67,135,600 vehicles. See United States Census Bureau, *supra* at 644.

erratic, or unlawful driving and "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity."[35] *Id.* at 1248-49. Despite the language, the court's application reveals this is not a categorically prohibited factor, but only that, without more, there is nothing suspicious about slowing down. This is a common-sense conclusion. Rationally, one could not infer illegal activity from the van's decrease in speed in this case, which was not even unusual.[36] Instead of creating a *per se* rule, the court considered the whole picture, including: there is no posted speed limit; the agent only guessed Arvizu's speed; and Arvizu was not driving unsafely, erratically, evasively, or unlawfully. Slowing down when encountering an officer is a perfectly normal response – a common-sense fact appellate courts have long recognized.[37]

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[35] See, *e.g.*, *Garcia-Camacho*, 53 F.3d at 247 (arguing both increases and decreases in speed are "suspicious," creating a "heads I win, tails you lose" trap for drivers who do not maintain constant speed); *Hernandez-Alvarado*, 891 F.2d at 1419 (Alarcon, J., concurring).

[36] Compare *Hodgers-Durgin* v. *De la Vina*, 199 F.3d 1037, 1048 (9th Cir. 1999) (in which Judge Reinhardt made a contrary conclusion on different facts: "Ms. Hodgers-Durgin's sole stop occurred immediately after her car slowed suddenly on the freeway, stopped for several minutes at an empty intersection, and then continued extremely slowly over a highway overpass. In light of her erratic behavior on the road, it is not surprising that she was stopped by a law enforcement officer.").

[37] See, *e.g.*, *Diaz*, 977 F.2d at 165 ("there is nothing suspicious about a speeding car slowing down after a marked patrol car turns to follow, with or without flashing lights . . . that is the expected reaction"); *United States* v. *Robert L.*, 874 F.2d 701 (9th Cir. 1989) (finding *de minimis* departures from normal driving do not provide reasonable suspicion); *United States* v. *Bloomfield*, 24 F.3d 1043, 1048 (8th Cir. 1994) (nervousness does not suggest criminal conduct as few innocent people would be calm after being stopped and ordered to sit in patrol vehicle).

The agent did not explain why slowing down was suspicious here. Especially under these circumstances, slowing down was not a furtive act, such as flight,[38] but was almost the opposite. Petitioner correctly notes that other courts have found speeding up or slowing down suspicious if the driver is trying to distance himself from the officer or if the driver is so distracted that he stops paying attention to the road. Pet. Br. 26 n.12. But none of these factors were present here.

Arvizu, by slowing down, having a stiff posture,[39] gripping the steering wheel, and keeping his eyes on the road, demonstrated the good, cautious behavior one would expect when suddenly encountering any vehicle on a rural, dirt road, especially a marked law enforcement vehicle.

As the court of appeals concluded, non-dangerous and non-evasive driving, such as the slowing down here, without more, does not rationally indicate criminal activity.

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[38] *Wardlow*, 528 U.S. at 124-26 (holding unprovoked flight is the "consummate act of evasion").

[39] This behavior does not show nervousness. See *United States* v. *Fernandez*, 18 F.3d 874, 881 n.5 (10th Cir. 1994) (discounting nervousness, characterized as the startled awakening and stiff demeanor of the passenger, finding the officer relied upon a hunch).

The driver failed to acknowledge the agent and appeared nervous.

The opinion ruled this factor has questionable value and carries weight, if at all, "only under special circumstances." Rather than create a *per se* rule, the court correctly noted there was nothing "out of the ordinary" to convert this fact into a suspicious circumstance.[40] Petitioner wrongly characterizes the opinion as excluding this factor from a *Terry* analysis. Pet. Br. 28. This was not a case where "a pedestrian looked at an officer just before he rushed to a car and drove away," or where a person would not look at an agent in order to conceal his face. Pet. Br. 29 (citing cases where these additional facts were present). Even the district court agreed the factor "doesn't mean a whole lot." Pet. App. 24a.

Clearly, lack of eye contact should not give rise to reasonable suspicion because choosing not to wave at or make eye contact with a law enforcement officer, without more, is not evasive or furtive conduct and cannot be suspicious of criminal activity.[41] The agent did not explain why this was suspicious. Although this factor is particularized to Arvizu, it is meaningless.

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[40] The conclusion that the court of appeals did not create a *per se* rule excluding this factor is evident from a subsequent case where it considered this factor as suspicious under differing circumstances. *United States* v. *Murillo*, 255 F.3d 1169, 1174 (9th Cir. 2001) (concluding "lack of eye contact" was suspicious when it occurred "at crucial moments in the[ ] conversation" between the driver and agent).

[41] It is a logical step from *Reid*, which acknowledged citizens have a right to go about their business, to say that it is not suspicious for citizens to not wave or smile at police officers.

The agent did not recognize the van as a local vehicle.

Petitioner incorrectly asserts that the lower court "barred consideration" of this factor. Pet. Br. 27. The court of appeals correctly ruled this factor was of such low probative value that no reasonable officer would have relied on it under the circumstances of this case, properly taking into account that the van was traveling through scenic and recreational areas. Indeed, this factor's relevance vanishes in light of the fact the agent discovered the vehicle belonged to a Douglas resident.

The agent admitted he was not "real familiar" with the area, conceded non-locals use the road, and never said this factor was suspicious to him. He never testified that he knew all of the local residents and recognized their vehicles. Although this factor might make sense in another setting, this factor signifies nothing here.[42] Basing reasonable suspicion upon this factor would also impinge upon the right to travel.

The children's knees were raised as if resting on cargo.

Contrary to Petitioner's brief, the court of appeals properly considered this factor and did not create a *per se* rule. The court correctly ruled this fact was of such low probative value that no reasonable officer would have relied on it under the circumstances of this case. Given the circumstances here – a family in a minivan, likely on a

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[42] Compare *United States* v. *Garcia-Barron*, 116 F.3d 1305, 1306-08 (9th Cir. 1997) (finding reasonable suspicion where defendants avoided a checkpoint at 3:00 a.m, driving on a road no one used for any legitimate purpose at that hour).

sightseeing or camping trip in the middle of the afternoon on a public holiday – there was nothing suspicious about the children's feet appearing to rest upon something on the floor. The opinion contrasted these facts with other cases involving vehicles that appeared heavily loaded. *Arvizu*, 232 F.3d at 1250. The children's knees were not even chest high – and the opinion made a common-sense observation that this position was as suggestive of resting on pillows, camping supplies, or suitcases as of resting on cargo. *Arvizu*, 232 F.3d at 1250-51. The fact the agent could see into the vehicle shows there was no attempt to obscure the view inside it with window coverings or tarps. The position of the children's knees does not support an inference of alien smuggling in this case.

The children waved oddly as if coached.

The opinion correctly ruled the children's conduct carries no weight in this case, recognizing it as a classic case of "damned if you do, equally damned if you don't."[43] *Arvizu*, 232 F.3d at 1249. The agent had barely finished criticizing the adults for not waving, when he

[43] Several circuits have identified the use of opposites as a particularly troubling pattern See, *e.g.*, *Gonzalez-Rivera* v. *INS*, 22 F.3d 1441, 1446-47 (9th Cir. 1994); *Lopez*, 564 F.2d at 713 (criticizing agents' claims of vehicles riding high or riding low as suspicious: "the border patrol's position seems to be '[r]iding high or riding low, either way a searching we will go' "); *United States* v. *De la Cruz-Tapia*, 162 F.3d 1275, 1278 n.1 (10th Cir. 1998) (agent undermined his credibility by testifying that both eye contact and lack of eye contact were suspicious).

testified it was suspicious that the children were waving. The opinion notes this incongruity, then remarks that because children are well-known to act impetuously and in ways that embarrass their parents, the children's waving here did not contribute to reasonable suspicion. *Arvizu*, 232 F.3d at 1249. To rule otherwise would mean the vast majority of parents might be regularly stopped. Totality of the circumstances analysis does not circumvent these common-sense observations.

There was no basis for the agent's supposition that the children had been coached to wave. This is a purely subjective impression.[44] In fact, there is no basis for the agent's supposition that the children were waving at him because "[i]t looked like the children were waving forward" and they were not even looking at him. J.A. 35. Moreover, waving, coached or not, does not imply criminal activity.

The van was registered to a resident of a block notorious for smuggling.

The opinion correctly ruled this factor was of such low probative value in this case that no reasonable officer would have relied on it. The van was registered to Leticia Arvizu, a resident of Douglas. There were no reports of illegal activity relating to either Leticia Arvizu, the van, or her Douglas address.

[44] See *Reid*, 448 U.S. at 441 (determining agent's claim that people were trying to hide the fact they were walking together was subjective).

Presence in a high crime area does not provide reasonable suspicion, but is a relevant factor.[45] But living in a high-crime area is a different consideration altogether. Presence in an area suggests an action within an individual's control. Residence in a high crime area relates to a person's status, is likely a function of poverty, and casts suspicion upon too many innocent people. Without more, merely living in a high crime area does not rationally suggest criminal activity. The district court concluded this fact "doesn't mean a lot." Pet. App. 25a. It is difficult to imagine an area in a border city that has not been so characterized.[46]

In addition, the court of appeals notes the agent "did not explain the factual basis for this assertion, nor did he identify the source of his information" and finds the district court's reliance upon it was misplaced. Petitioner's argument that the Douglas address meant the van's trip started from a smuggling area, Pet. Br. 31, is circular; after all, most trips start from home. Petitioner's argument still uses residence as a basis for suspicion.

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[45] *Brown*, 443 U.S. at 52.

[46] Compare *United States* v. *Grant*, 920 F.2d 376, 386 (6th Cir. 1990) (noting "our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center").

The Totality of Circumstances the Agent Observed was of a Family Holiday Outing, Not Suspicious Criminal Activity.

The totality of the circumstances the agent observed was that of a family on an outing. The agent saw a man, a woman, and three children traveling in a minivan – a popular family car – at 2:15 p.m. on a holiday, adjacent to a recreational area. The vehicle did not appear heavily laden, was not riding low, and no attempt had been made to conceal its contents. No one in the van made furtive movements, took evasive action, or tried to hide. The van slowed down as it approached the patrol vehicle, and the driver held the wheel tightly as he approached and passed the agent's vehicle, which was angled in the roadway. The driver did not violate any traffic laws and did not create a road hazard or obstruction. He drove carefully, with both hands on the wheel. Although the adults did not look at the agent, the children began waving oddly.

The agent did not suspect either the driver or the passengers were illegal aliens. Because of the location of the sensor, he also had no reason to suspect the van had recently crossed the border. When the agent checked the van's registration, he learned that it was registered to a Douglas address. Although smuggling activity occurs in Douglas (as in all border towns), the agent had no suspicious information about the Douglas address, the van, or its owner. None of the agent's observations and subjective impressions supported a rational inference Arvizu was engaged in criminal activity. No objectively reasonable factors or inferences pointed towards smuggling

activity. Nothing negated this picture of innocent conduct, which describes a large group of law-abiding citizens.

Although officers may perceive conduct as suspicious that appears innocent to untrained observers, they must articulate any special meaning to the courts, which assess reasonableness independently of the police officers' subjective assertions. This ensures that the courts, rather than the police, are the ultimate enforcers of the Fourth Amendment. The agent lacked a reasonable, objective basis for believing the van's occupants were involved in criminal activity and instead relied upon subjective factors and unreasonable inferences. There was no reasonable suspicion for the investigative stop.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH ARVIZU

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's brief is founded on a contradiction. On the one hand, respondent argues that in reviewing reasonable-suspicion determinations, courts of appeals must provide "guidance" to law enforcement officers by identifying factors the officers may and may not consider; this, he asserts, will provide "uniformity across cases." Resp. Br. 18-23. On the other hand, respondent maintains that the court of appeals did nothing more than conduct an unremarkable analysis of whether, on the totality of the circumstances in this case, reasonable suspicion existed. *Id.* at 23-31. Respondent is wrong on both counts. De novo appellate review of reasonable-suspicion determinations does entail an independent analysis of each case, but it does not require, as the court of appeals thought, the establishment of categorical rules about the factors that officers may and

may not consider. And the court of appeals did self-consciously purport to lay down categorical rules for future cases, thereby departing from this Court's totality-of-the-circumstances test. See Pet. App. 12a ("Thus we attempt here to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here."). Neither respondent's effort to raise the threshold for reasonable-suspicion determinations nor his argument against the validity of the stop in this case has merit. The judgment of the court of appeals should be reversed.

A. A Basic Principle of Fourth Amendment Law Is That Facts Consistent With Innocent Conduct Can, In Combination, Give Rise to Reasonable Suspicion Of Criminal Activity

1. Respondent attempts to justify the court of appeals' exclusion of certain types of facts from its analysis by making two observations about the nature of reasonable suspicion that are uncontroversial, but also inapplicable to the question of whether categories of facts may be put off-limits to officers. First, respondent notes that "the degree of suspicion that attaches to conduct may be so low that no reasonable officer would rely on that fact * * * in deciding to make an investigative stop." Resp. Br. 14. It is self-evident that not every fact known to an investigating officer will contribute to a suspicion of illegal activity. There doubtless were many facts about respondent and his passengers that Agent Stoddard observed but that did not add to his suspicion. See, *e.g.*, J.A. 68 (testimony of Agent Stoddard that nothing in the appearance of the occupants of the minivan was suspicious). That does not mean, however, that categories of facts can be ruled

irrelevant in the abstract. Officers making investigative stops and courts reviewing stops must consider "the totality of the circumstances—the whole picture" of the particular case. *United States* v. *Cortez*, 449 U.S. 411, 417 (1981). The Ninth Circuit violated that rule when it "circumscribed" the "factors law enforcement officers may consider." Pet. App. 11a.

Second, respondent notes that some facts "*standing alone*" will not support an investigative stop. Resp. Br. 14-15 (emphasis added). That observation likewise has no application to this case, because Agent Stoddard's reasonable suspicion of illegal smuggling arose from the collective significance of all the facts known to him. See Pet. App. 21a-25a. There is nothing novel about the principle that a fact that would not alone establish reasonable suspicion may nevertheless support reasonable suspicion in conjunction with other facts. In *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), for instance, the Court held that an individual's presence in an area known for drug trafficking could be a factor supporting an investigative stop, notwithstanding that, under *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), such presence is not sufficient grounds for a stop. 528 U.S. at 124. Similarly, the fact that an individual is driving a minivan would not alone justify an investigative stop, but, in the border context, driving a minivan that is capable of carrying concealed aliens or a large quantity of hidden drugs is potentially relevant to reasonable-suspicion analysis—particularly where, as here, the vehicle is out of character for the dirt road and smugglers have used minivans in the same area in the past. Pet. App. 22a, 23a; U.S. Br. 6; see *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (noting that "[a]spects of the vehicle itself may justify suspicion" and specifically mentioning station wagons).

2. Starting from those propositions that (1) some facts may be immaterial in some contexts and (2) some facts will never alone justify an investigative stop, respondent suggests a new Fourth Amendment test. Although "ordinary, innocuous facts" may contribute to reasonable suspicion, respondent states, "there must be 'other information or surrounding circumstances of which the police are aware'" before an investigative stop may be made. Resp. Br. 24 (quoting Pet. App. 10a); see *id.* at 27 (same); *id.* at 13 (arguing that "[o]bservations of neutral and common facts" are insufficient to support reasonable suspicion and that there must be a particular factor that "objectively single[s] out a person from the general law-abiding population"); see also Brief of DKT Liberty Project (DKT Br.) 16-18 (making similar argument).

This Court's analysis in *United States* v. *Sokolow*, 490 U.S. 1 (1989), forecloses respondent's approach. In *Sokolow*, the Ninth Circuit had held that characteristics that are not unique to drug couriers (such as the individual's itinerary, luggage, or method of payment for his ticket) cannot justify an investigative stop unless other facts indicate ongoing criminal activity. See *id.* at 6 (summarizing court of appeals' holding). This Court disagreed, noting that such evidentiary rules have no place in reasonable-suspicion analysis, which should instead involve a commonsense assessment of the whole picture seen by the investigating officer. *Id.* at 7-9. Each of the factors supporting the airport stop, the Court explained, was "quite consistent with innocent travel," but "taken together," the facts nevertheless amounted to reasonable suspicion. *Id.* at 9; see also *id.* at 9-10. Other decisions of this Court are to the same effect. *Wardlow*, 528 U.S. at 125 (lawful conduct that is "ambiguous and susceptible of an innocent explanation"

can nevertheless contribute to reasonable suspicion); *Reid* v. *Georgia*, 448 U.S. 438, 441 (1980) (per curiam) ("there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot"); cf. *Illinois* v. *Gates*, 462 U.S. 213, 244 n.13 (1983) ("innocent behavior frequently will provide the basis for a showing of probable cause").

As the Court indicated in *Sokolow*, respondent's proposed approach of classifying potentially relevant facts would "create[] unnecessary difficulty" in applying the Fourth Amendment. 490 U.S. at 7. Judge Kozinski has described the sort of approach urged by respondent as establishing "different classes of factors—regular and jumbo." *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinksi, J., concurring), cert. denied, 531 U.S. 889 (2000). Judge Kozinski noted that he "ha[s] no clue" how those classifications bear on the Fourth Amendment's reasonableness standard, "which makes [him] think that cops on their beats * * * will have some trouble figuring it out as well." *Ibid.*

B. Reasonable Suspicion Analysis That Is Grounded In The Contextual Significance Of All The Facts Protects Against Arbitrary Stops

1. Respondent next maintains that, if the stop in this case is upheld, investigative stops will be immune from effective judicial review and "anything an officer says [in support of a stop will be] sufficient" to pass Fourth Amendment muster. Resp. Br. 14; see *id.* at 33-34; see also Brief of National Association of Criminal Defense Lawyers, *et al.* (NACDL Br.) 6-11. That argument is unfounded.

The United States has not suggested that "all reasons agents offer [for a stop] are entitled to incriminatory weight." Resp. Br. 33. Instead, this Court's decisions require courts to review each case on its facts and to consider the significance of each fact known to an officer in light of the other facts known to the officer. See U.S. Br. 15-31. There is no inconsistency between that approach and effective judicial review. A court's role is to determine whether the officer considered all of the relevant circumstances, and whether, in light of those circumstances, the officer had a particularized and objective basis for suspicion. See *Cortez*, 449 U.S. at 417-418; *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). The records of those judicial inquiries constitute a body of "unif[ied] precedent," *id.* at 697, and guide aw enforcement officers as they face analogous and related situations. That process lends predictability to reasonable-suspicion analysis despite its inherently fact-specific character. See *id.* at 697- 698.

The district court in this case performed the requisite analysis. "View[ing] the case in the context of what was going on out there" and what was known to Agent Stoddard (Pet. App. 22a), the district court culled the relevant facts from the testimony (*id.* at 22a-25a) and found "reasonable and objective and articulable facts to support the stop of the vehicle" (*id.* at 25a). The district court determined that some of the facts on which Agent Stoddard had relied, such as respondent's route around the Border Patrol's I-191 checkpoint and the minivan's capacity for carrying a large amount of concealed cargo, were particularly "important" parts of the total picture. *Id.* at 22a, 23a. And it gave specific reasons for rejecting respondent's argument that "there [wa]s really nothing to separate [respondent] and his vehicle from a law-abiding citizen." J.A. 134 (argument of respondent's counsel); see Pet. App. 22a-25a. In sum, the district court's proceedings confirm the correctness of this Court's longstanding assessment that a "'practical,' 'nontechnical,' and 'common sense'" approach to Fourth Amendment analysis need not be "overly permissive," and that lower courts can be trusted "to 'hold the balance true.'" *Gates*, 462 U.S. at 241 (quoting Brennan, J., dissenting, *id.* at 290).

2. The totality-of-the-circumstances rule also does not suggest that courts of appeals will rubber-stamp district courts' determinations of reasonable suspicion. In *Ornelas*, the Court held that although appellate courts should "review findings of historical fact only for clear error and * * * give due weight to inferences drawn from those facts by resident judges and local law enforcement officers," 517 U.S. at 699, they must decide de novo whether the officer did or did not have reasonable suspicion, *id.* at 695-699. The *Ornelas* Court reaffirmed the totality-of-the-circumstances test and that reasonable suspicion cannot "readily, or even usefully, [be] reduced to a neat set of legal rules" (*id.* at 695-696) (internal quotation marks omitted), even as it instructed the courts of appeals to undertake the "thorough, plenary review" that respondent urges (Resp. Br. 34). Respondent does not suggest, much less show, that the courts of appeals have been unable to undertake the independent review required by *Ornelas* while adhering to the totality-of-the-circumstances approach.

3. Respondent represents that the United States contends that a reviewing court should consider only the totality of the facts that the investigating officer identified as significant, "not the whole picture" (Br. 26), and, further, that the quantity of factors identified by the officer has primary importance (Br. 34). Respon-

dent is again incorrect. As noted above, the first responsibility of a court undertaking reasonable-suspicion analysis is to identify all of the relevant circumstances. See *Cortez*, 449 U.S. at 417; *Ornelas*, 517 U.S. at 696. Whatever their number, those circumstances *collectively* form the basis for reasonable-suspicion analysis.

4. Respondent's amici suggest that this case has some bearing on the issue of "racial profiling." NACDL Br. 15-16; DKT Br. 6-15. Yet, as respondent notes (Br. 6), Agent Stoddard testified that his decision to stop the minivan was not influenced by the physical appearance of its occupants. See J.A. 68. Unlike the circumstances of a stop that is based solely on broad and unjustified generalizations about the targeted racial group, each of the ten factors that the district court deemed supportive of the stop in this case relates to specific activities of respondent or his passengers, or particular facts about their vehicle. See U.S. Br. 8-10 (listing factors).[1]

[1] Relying primarily on arguments made by the class-action plaintiffs in *Hodgers-Durgin* v. *De La Vina*, 174 F.R.D. 469 (D. Ariz. 1997) (No. Civ. 95-029 TUC-JMR), aff'd in part, 199 F.3d 1037 (9th Cir. 1999), amicus DKT Liberty Project maintains that the Border Patrol makes a high percentage of groundless stops. See DKT Br. 8; DKT App. 1a-2a. Although the *Hodgers-Durgin* case was dismissed on standing grounds, the government introduced evidence rebutting the assertions on which DKT relies. The government's analysis of the radio logs used by the plaintiffs showed that out of 682 vehicle stops, 101 (approximately 15%) resulted in an arrest. Border Patrol agents, moreover, do not always make an arrest when they uncover illegal activity. For example, agents may allow illegal aliens to return voluntarily to Mexico, or they may allow aliens who are authorized to work only in a particular area of the United States to return voluntarily to that area. More generally, the miscellaneous reports on which amicus relies (DKT Br. 7-12) cannot be accepted as reliable indications of the percentage of suspects who are stopped on proper *Terry* grounds (rather than in a consensual stop or otherwise) and later are subject to arrest.

C. The Totality Of The Facts Of This Case Supported A Reasonable Suspicion Of Criminal Activity And Was Not, As Respondent Argues, Indicative Of A Family Outing

Turning to the facts of this case, respondent argues that they "indicated only a family in a minivan on a holiday outing, not criminal behavior." Resp. Br. 34. That argument is untenable in light of the "essentially undisputed" (*ibid.*) record evidence and the district court's findings of historical fact. See U.S. Br. 31-35.

Like the court of appeals (Pet. App. 12a-18a), respondent attempts (Br. 35-46) to show that each factor cited by the district court is not *independently* suspicious. The relevant question, however, is whether "the whole picture" created by all the facts "taken together" supported a reasonable suspicion of illegal activity. *Sokolow*, 490 U.S. at 8, 9. When forming his suspicions, Agent Stoddard thus was entitled to rely on the mutually reinforcing character of respondent's route, timing, and vehicle, and the behavior of respondent and his passengers.

To the limited extent that respondent considers the interrelationship of the facts, he suggests that, even if some of the facts might independently have aroused suspicion, Agent Stoddard should have disregarded them because, in other respects, the minivan had the appearance of carrying a family on an outing. For instance, respondent argues (Br. 43) that Agent Stoddard should have ignored the raised position of the children's knees on the assumption that it indicated the presence of camping equipment or suitcases. Respondent similarly contends that his route around the I-191 check-

point (*id.* at 35), his use of a minivan capable of carrying a large amount of concealed cargo (*id.* at 38), and Agent's Stoddard's failure to recognize the minivan (*id.* at 42) should have carried no weight because they were consistent with a family trip. See also *id.* at 2-3, 35 (arguing that respondent's route of travel was customary for recreation vehicles).

Respondent's arguments depend on his assertion (Br. 3 n.5) that his "route of travel would not have been unusual" for a family attempting to reach a camping or picnic site. But that is nothing more than a challenge to the factual findings of the district court. The district court determined that respondent was not taking a logical route to any recreation area when he was stopped. See Pet. App. 22a; see also U.S. Br. 33. Respondent made no effort on appeal to show that the district court's findings about that "distinctive feature[] * * * of the community" were clearly erroneous, *Ornelas*, 517 U.S. at 699, and the court of appeals did not make any such determination. The trial court, moreover, amply explained why it found petitioner's reliance on the existence of the Chiricahua National Monument and other recreation areas north of Rucker Canyon Road (see Resp. Br. 2 n.4, 3 n.5) unpersuasive. Those recreation areas, the court noted, are "accessible through paved road I-[1]91 and then taking paved road 181. And picking up the road from there, paved I-181, all the way to that area does not require * * * a 40-mile trip at least, through a dirt road." Pet. App. 22a; see J.A. 157 (map). The very limited traffic on the back roads used by respondent makes it apparent that the vast majority of innocent travelers do in fact take the

highway when going from Douglas to the northern recreation areas. See U.S. Br. 4.[2]

The district court therefore was correct that respondent's route around the Border Patrol checkpoint colored the other facts known to Agent Stoddard. See Pet. App. 23a; see also U.S. Br. 32-33. "It would have been poor police work indeed," *Terry* v. *Ohio*, 392 U.S. 1, 23 (1968), for Agent Stoddard to ignore the implications of respondent's route and to presume conclusively that respondent was on an innocent family outing, just because respondent was in the vicinity of recreation areas and had a woman and three children in his vehicle.

That is all the more true because respondent tripped the first sensor on Leslie Canyon Road at approximately 2:15 p.m., around the time when the agents who patrolled the area suspended their surveillance and began returning to the I-191 checkpoint for a 3 p.m.

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[2] Respondent observes that a driver who lives on Leslie Canyon Road might go north on the dirt roads rather than heading south to Douglas and taking the highway from there. See Resp. Br. 3, 35; J.A. 26. But Agent Stoddard did not recognize respondent's minivan as a local vehicle, and he knew that it was registered to an address in Douglas. See Pet. App. 24a; U.S. Br. 32-33. Agent Stoddard therefore had compelling reasons to believe that the minivan started its trip in Douglas, rather than along Leslie Canyon Road. In that regard, respondent argues (Br. 42) that Agent Stoddard's failure to recognize the minivan was insignificant because Stoddard supposedly "was not 'real familiar' with the area." What Agent Stoddard actually said (J.A. 52) was that he was "[n]ot real familiar" with the Chiricahua National Monument, which, as the district court explained, is "quite a few miles to the north" and not logically accessed by the roads Agent Stoddard patrolled (Pet. App. 22a). Agent Stoddard specifically testified that he had "spen[t] enough time out there" to be familiar with "the normal traffic, which is ranchers and so forth." J.A. 37.

shift change. See U.S. Br. 4, 32 n.17. Respondent suggests (Br. 37) that it "makes no sense" for smugglers to step-up their activity during a shift change, because Border Patrol agents returning to the checkpoint might see them. The district court, however, did not question and apparently accepted (Pet. App. 23a) Agent Stoddard's testimony that smugglers "seem to do the most smuggling * * * when the agents are en route back to the checkpoint." J.A. 26; see J.A. 47-48. Respondent also ignores that a smuggler traveling north on the back roads before 3 p.m. would be traveling in the same direction as a Border Patrol agent returning to the I-191 checkpoint, which would minimize the smuggler's chances of meeting the agent on the road. Finally, a smuggler could see the dust trail of a moving Border Patrol vehicle a half-mile away (see J.A. 31), whereas a parked Border Patrol vehicle monitoring the road would not give an early warning of its position.

Contrary to respondent's argument (Br. 36-37), *Reid* v. *Georgia*, 448 U.S. 438 (1980) (per curiam), does not undermine Agent Stoddard's reliance on the time of respondent's trip. In *Reid*, the early morning hour and other factors that the officers deemed suspicious collectively described "a very large category of presumably innocent travelers." *Id.* at 441. Here, respondent's unusual path over a "notorious" (J.A. 30) smuggling route, the precise time of his trip, his atypical use of a minivan rather than a four-wheel-drive vehicle (see U.S. Br. 6), the indication that he was carrying cargo even though he was not headed toward a local recreation area, the fact that the minivan was not a familiar local vehicle, and the Douglas registration of the minivan all cast particularized suspicion on respondent.[3]

Agent Stoddard's suspicion appropriately increased when respondent slowed dramatically and appeared nervous as he drove by. See U.S. Br. 5-6, 34. Respondent asserts that his sharp deceleration from approximately 50 miles per hour to approximately 25 miles per hour "was not even unusual." Resp. Br. 39. But Agent Stoddard testified that it is not common for drivers in that area to cut their speed in half when they see an officer, J.A. 57, and respondent did not introduce any contrary evidence. Agent Stoddard, moreover, did not cause respondent to slow down by parking "in the roadway" (Resp. Br. 46). Rather, Agent Stoddard parked his vehicle in "a little area" "off to the side of the road." J.A. 32.[4]

Agent Stoddard reasonably became still more suspicious when the children in respondent's van engaged in their unusual and apparently coached waving. See U.S. Br. 6-7, 34. Far from resting on an "inchoate and unparticularized suspicion or 'hunch,'" *Reid*, 448 U.S. at 441 (quoting *Terry*, 392 U.S. at 27), as respondent sug-

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[3] Respondent argues (Br. 45-46) that the minivan's registration had no legitimate significance. Elsewhere, however, respondent recognizes (*id.* at 42) that the registration to a Douglas address—like Agent Stoddard's failure to recognize the minivan—suggested that respondent was not on a local trip. The address of the registration was relevant because it reinforced particularized suspicion that respondent was on a smuggling run from the border to the interior of Arizona. See U.S. Br. 31.

[4] The point of respondent's argument that there was no posted speed limit (Br. 39) is unclear, since respondent maintains (*id.* at 40) that he was obeying all traffic laws. In any event, the roads used by respondent do have speed-limit signs. See J.A. 171, 179, 181 (showing signs).

gests (Br. 44 & n.44), Agent Stoddard's belief that the children were not waving on their own initiative was based on first-hand experience with the way that children normally wave to Border Patrol agents. J.A. 61; see *Brignoni-Ponce*, 422 U.S. at 885 ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.").

Respondent thus is incorrect when he asserts (Br. 9) that "[t]he factors [Agent Stoddard] relied upon would describe a large number of law-abiding citizens." It is hard to imagine an "innocent traveler[]," *Reid*, 448 U.S. at 441, who would traverse the back roads around Douglas under the same suspicious circumstances. And the totality of the circumstances certainly gave Agent Stoddard the requisite "minimal level of objective justification for making the stop." *Wardlow*, 528 U.S. at 123.

* * * * *

For the reasons given above, as well as those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH ARVIZU,

Respondent.

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AUG 31 2001
UNSCANNED

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment of the United States Constitution. The Association is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file *amicus curiae* briefs

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[1] The Parties have consented to the filing of this brief.

Amici curiae state, pursuant to Sup. Ct. R. 37.6, that this brief was not authored in any part by counsel for any party. No person or entity, other than *amici* and their counsel, made a monetary contribution to the submission of this brief.

to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

STATEMENT OF THE CASE

Amici curiae rely on the Statement of the Case submitted by Respondent Ralph Arvizu.

SUMMARY OF ARGUMENT

1. As articulated by this Court, the totality of the circumstances test that governs reasonable suspicion determinations is conducted by weighing the individual facts of a case against an objective legal standard as a means of preserving Fourth Amendment constitutional values. Although it is a fact-specific inquiry, through precedent, it is intended that courts will establish the parameters of what supports a reasonable suspicion. Indeed, courts, particularly appellate courts, contribute to the analysis consistent with their core function of developing the constitutional common law; particularly in the context of the Fourth Amendment, federal courts play a crucial role in defining the contours of constitutional protections. The definition is critical, as this Court has recognized the need to curb unfettered discretion on the part of law enforcement as a means of ensuring individuals' freedom from arbitrary intrusion by the police. Here, the Court of Appeals' decision appropriately and necessarily contributes to the evolution of the law by establishing that, in particular circumstances, certain factors do not in fact contribute to a finding of reasonable

suspicion. Through the articulation of these guidelines, the Court of Appeals furthers the development of a necessary constitutional backstop to police searches and seizures.

2. Its appropriate holding of law as applied to these facts notwithstanding, the Court of Appeals' opinion is an unremarkable application of *de novo* review to the facts of this case. The court's consideration of each of the facts at issue was based on its experience with these types of cases, as applied to a particular set of facts. Under these circumstances, the Court of Appeals properly determined that the factors alleged to give rise to a reasonable suspicion did not, in fact, raise such a suspicion and, under the Fourth Amendment, a stop and search based upon these particular facts was unwarranted and unconstitutional.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY FULFILLED ITS FUNCTION OF DEFINING THE PARAMETERS OF THE TOTALITY OF THE CIRCUMSTANCE TEST THAT GOVERNS REASONABLE SUSPICION INQUIRIES UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the decision below, the Court of Appeals undertook to provide lower courts and law enforcement officers with guidance as to what factors may and may not be given weight in determining whether there is reasonable suspicion of criminal wrongdoing, sufficient to permit an investigative stop of an automobile. *United States v.*

Arvizu, 232 F.3d 1241, 1248 (9th Cir. 2000). The Government portrays the Court of Appeals' decision as incorporating "methodological errors" that pose a fundamental threat to established Fourth Amendment law and this nation's ability to control its borders. *Brief of United States* at 31 (hereinafter "*Pet.'s Br.*"). In the Government's view, any attempt to rationalize this exhaustively litigated area of the law is impermissible, because it conflicts with the "totality of the circumstances test" that governs determinations of reasonable suspicion. *Pet.'s Br.* at 20-21. In fact, however, a court may, in certain circumstances, extract principles of general application from well-established case law and experience, without violating the totality of the circumstances approach. Moreover, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court called upon appellate courts to develop such principles through searching *de novo* review of reasonable suspicion determinations. Indeed, the development of such principles is both inherent in the notion of case law and critical to the development of Federal Constitutional standards. The holding sought by the Government would hamper the Courts of Appeals from articulating workable standards in this troubled area of search and seizure law through the case-by-case process of common law development, which has always characterized our constitutional jurisprudence.

Amici agree, of course, that the existence of reasonable suspicion depends upon the totality of the circumstances. That determination is conducted by weighing the individual facts of a case against the legal standard established as a means of preserving core Fourth Amendment constitutional values: an investigatory stop by the police,

including a stop of a vehicle, is permissible under the Fourth Amendment only where the law enforcement officer has "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.' " *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Such a stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981). In making this determination, the court must consider " 'the totality of the circumstances – the whole picture.' " *Sokolow*, 490 U.S. at 8 (quoting *Cortez*, 449 U.S. at 417).

The legal issue before this Court, as presented by the Government, focuses not upon the result reached by the Court of Appeals, but upon the court's alleged "methodological errors" in conducting its Fourth Amendment analysis. *Pet.'s Br.* at 31. That is, the Government faults the Court of Appeals because it sought to "delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Pet.'s Br.* at 21 (quoting *Arvizu*, 232 F.3d at 1248). In the Government's view, *any* attempt to define and describe which factors may be considered by law enforcement officers in making investigatory stops is simply impermissible under this Court's totality of the circumstances test. *Pet.'s Br.* at 20-21. Rather, according to the Government, a reviewing court must start with a clean slate in every case, and simply "weigh" the totality of the circumstances. Apparently, then, no factor can be ruled out; if a law enforcement officer noticed or referred to a factor, it must be weighed in the analysis. Therefore, according to the Government's argument, any attempt to

synthesize the case law by declaring certain factors to be usually or wholly irrelevant, based on reason and experience, runs afoul of this Court's insistence that the totality of the circumstances must be considered in every case.

In so urging, the Government makes an extreme argument that, in effect, courts have *no* role in defining what circumstances are relevant to a finding of reasonable suspicion. That extraordinary contention undermines a core function of the courts – establishing the contours of constitutional protections through the development of the law and establishment of precedent. It also misconstrues this Court's prior decisions and endangers courts' ability to ensure individuals the protection of the Fourth Amendment. In fact, wholly consistent with its role, the Court of Appeals here appropriately applied the relevant analysis in a way that contributes to the judicial development of Fourth Amendment law and, consequently, positively advances the understanding of reasonable suspicion. Should the Government's position prevail, law enforcement officers would be deprived of established norms to assist them in reasonable suspicion determinations, and citizens would never know what behavior might subject them to intrusions on their privacy.

There is, moreover, no clash between the totality of the circumstances test and the notion that courts may make judgments as to what circumstances are relevant to the implementation of such a test. Rather, it is the Government's position that directly clashes with this Court's holdings as to the proper role of appellate courts in this area. This Court has decreed that appellate review of reasonable suspicion determinations should "unify precedent and . . . provid[e] law enforcement officers with a

defined 'set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.' " *Ornelas*, 517 U.S. at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981) and citing *Thompson v. Keohane*, 516 U.S. 99, 115 (1995)). In *Ornelas*, this Court held that appellate courts must exercise *de novo* review over lower courts' determinations of reasonable suspicion and probable cause in order to develop just such "rules." Even where one case may not directly and squarely control another, the Court wrote, "the two decisions when viewed together may usefully add to the body of law on the subject." *Ornelas*, 517 U.S. at 698. The very fact-specificity of the issue, when subjected to searching appellate review, can and does produce useful principles of general application. Indeed, as the Government itself recognizes, courts in the Ninth Circuit are faced with a myriad of cases involving the Border Patrol: two thirds of the Border Patrol's apprehensions occurred within the Ninth Circuit, and the southern edge of the circuit contains the busiest border crossing in the world. *Petition for a Writ of Certiorari* at 21. Such a high volume of Border Patrol cases yields similar fact patterns, underscoring the need for and ability of appellate courts in that circuit to establish guiding principles and thereby to assist law enforcement and lower courts in the fair and efficient adjudication of these matters.

Further, although the totality of the circumstances test aims to establish a "practical and nontechnical" standard, *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Bringar v. United States*, 338 U.S. 160, 176 (1949)), it is not,

as a result, devoid of meaning. Absent judicial interpretation and oversight, however, it may become standardless. True, the totality of the circumstances approach, announced by the Court in *Gates*, can not be readily "reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. That does not imply, however, that *no* standards are possible. Because the analysis requires an "objective justification" for a stop, such that the law enforcement officer must be able to "articulate more than an 'inchoate and unparticularized suspicion or 'hunch' ' " of criminal activity, *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (quoting *Terry*, 392 U.S. at 27), courts must flesh out what amounts to a reasonable justification in order to establish the constitutional backstop for investigatory stops. Particularly in the context of border area stops, "the reasonableness requirement of the Fourth Amendment demands something more than [ ] broad and unlimited discretion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).

Indeed, courts flesh out the meaning of the totality of the circumstances analysis consistent with their function of interpreting the constitution and with our common law tradition; the fundamental method of American jurisprudence is predicated on the gradual development of law, including constitutional law, by establishing precedent to guide other courts, lawyers, citizens and law enforcement facing similar or analogous situations. By applying a set of facts to establish holdings, courts, and particularly appellate courts, contribute to the incremental evolution of the law in an orderly and stable fashion. As this Court recently recognized, "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of

modifications represented by [ ] cases are as much a normal part of constitutional law as the original decision." *Dickerson v. United States*, 530 U.S. 428, 441 (2000). This method of developing the law is the very nature and virtue of our common law: "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law . . . we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Funk v. United States*, 290 U.S. 371, 382-83 (1933) (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)). And, once the law is established, these holdings are subject to wider applicability. This Court has often cited Justice Cardozo's reminder that: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921). *See, e.g., Hubbard v. United States*, 514 U.S. 695, 711 (1995); *Runyon v. McCrary*, 427 U.S. 160, 190-91 (1976) (Stevens, J., concurring). It is axiomatic that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . [T]he very concept of the rule of law underlying our own Constitution requires such continuity over time." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992).

The Government, however, seeks to impair this core judicial function, arguing that the courts' ability to provide guidance to other courts and to law enforcement by establishing the parameters of "reasonable suspicion"

and creating precedent in this area is "unequivocally foreclosed" by the totality of the circumstances test. *Pet.'s Br.* at 21. To the contrary, by announcing that, in certain circumstances, certain factors have no weight in the reasonable suspicion analysis, the Court of Appeals contributes to the deliberative process of developing Fourth Amendment jurisprudence, applying its extensive experience with these types of cases to assist in creating clarity and consistency on the issue and providing needed guidance for law enforcement and the lower courts in this area. Recognizing that multi-factor, fact-specific tests introduce "a troubling degree of uncertainty and unpredictability into the process," *Arvizu*, 232 F.3d at 1248, the Court of Appeals here simply established precedent with respect to the facts at issue in "the stop involved here," *id.*, as is its province and its duty.

The Government's implication that courts can play no role in refining the totality of the circumstances analysis not only undermines the very foundations of our legal tradition, but is particularly dangerous in this Fourth Amendment context. In the realm of the Fourth Amendment, courts serve the critical function of constitutional interpretation, as "the legal rules for probable cause and reasonable suspicion acquire content only through application," and appellate courts are especially needed "to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). *See also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. ___, 121 S. Ct. 1678, 1685 (2001) (citing *Ornelas* with approval). Without courts being able to articulate the parameters of the standard against which law enforcement officers can measure

the reasonableness of their suspicion, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." *Terry*, 392 U.S. at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)). *See also Keohane*, 516 U.S. at 115 ("the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law"). This would undermine a central concern of Fourth Amendment jurisprudence. *See Payton v. New York*, 445 U.S. 573, 583-85 (1980). As this Court has stated, "The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (internal quotations omitted).[2]

The Government's warning that courts can play no law-making function in this context because to do so would somehow confuse or frustrate law enforcement efforts, *Pet.'s Br.* at 23-24, similarly carries no weight. Elucidating the contours of constitutional rights is precisely the courts' function, and this Court accordingly does not shrink from establishing rules regarding law

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[2] *See also United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir.), *cert. denied, Sanchez-Guillen v. United States*, 531 U.S. 889 (2000) (Kozinski, concurring) ("to rely on every cop's repertoire of war stories to determine what is a 'high crime area' – and on that basis to treat otherwise innocuous behavior as grounds for reasonable suspicion – strikes me as an invitation to trouble").

enforcement's role and authority in the Fourth Amendment context, trusting that the police will be able to "recall and apply," *Pet.'s Br.* at 23, these rules.[3] In fact, a review of this Court's most recent Fourth Amendment decisions confirms that courts are expected to refine the various tests and analyses that have been created over the years to effectuate Fourth Amendment protections, and law enforcement is expected to comply.

For example, in *Kyllo v. United States*, 533 U.S. ___, 121 S. Ct. 2038 (2001), the Court grafted a fact-specific requirement onto an already established Fourth Amendment rule to give further meaning and content to that rule. Specifically, the Court examined when a warrantless search of a home is considered reasonable: "[w]here, as here, the Government uses a device that is not in the general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 2046. The Court noted that, with this new rule, it was supplementing the time-worn analysis set forth in *Katz v. United*

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[3] The Government's suggestion that the police need no rules or guidelines in this area is counterintuitive and wrong. This Court consistently develops rules, even bright-line rules, to assist law enforcement in doing its job. For example, this Court recently affirmed the constitutional basis for the requirement, set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), that four specific warnings must be given before a suspect's statement made in the course of custodial interrogation may be admitted into evidence. *Dickerson v. United States*, 530 U.S. 428 (2000). These "concrete constitutional guidelines" are necessary to protect against coercion inherent in custodial police interrogation. *Id.* at 435 (quoting *Miranda*, 384 U.S. at 442).

States, 389 U.S. 347 (1967), regarding when an individual has a subjective expectation of privacy that society is "prepared to accept as reasonable." *Id.* at 2043. The Court noted that the new standard was limited to a particular set of circumstances: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . constitutes a search – at least where (as here) the technology in question is not in public use." *Id.* at 2043 (quotation omitted). Indeed, both the majority and the dissent recognized that the Court was setting forth a new requirement as a means of clarifying when, in light of new technology, the Fourth Amendment test set forth in *Katz* had been met. *Id.* at 2044; *Id.* at 2050 (Stevens, J., dissenting) ("the Court has fashioned a rule that is intended to provide essential guidance for the day when 'more sophisticated systems' gain the 'ability to see through walls and other opaque barriers' "). Nor did any difficulty that law-enforcement may have in complying with additional elements of an established Fourth Amendment rule preclude the Court from imposing this additional requirement on the assessment of "reasonable expectation of privacy." *See also Bond v. United States*, 529 U.S. 334, 338-39 (2000) (holding that law enforcement's manipulation of a bag in an overhead bin on a bus violates a passenger's reasonable expectation of privacy).

Similarly, in its effort to "describe and delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved [in this case]," *Arvizu*, 232 F.3d at 1248, the

Court of Appeals endeavored to create Fourth Amendment limits on law enforcement's authority. In so doing, the court appropriately found that there are some factors which do not give rise to the suspicion necessary to pass muster under this analysis. Thus, to the extent that the Court of Appeals established, as a matter of law, whether certain facts in a given circumstance may be considered relevant to the totality of the circumstances determination, the court was acting consistent with the purpose of judicial review in this area: to develop Fourth Amendment law and protect individuals from "arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 877.

The Court of Appeals discounted several factors, some of them seemingly on grounds of mere irrelevance or triviality. But the value of the Court of Appeals' approach is perhaps best demonstrated by its rejection of a factor that is potentially pernicious, in addition to being irrelevant: the neighborhood to which Respondent's vehicle was registered. The Court of Appeals considered the fact that the vehicle was registered to an address on a block notorious for smuggling and found that, under the circumstances of this case, this fact was of "no significance and may not be given any weight." *Arvizu*, 232 F.3d at 1250. In so ruling, the court stated that "one's place of residence is simply not relevant to a determination of reasonable suspicion." *Id.*[4] The court noted that, while an

[4] While ruling that this fact was, as a matter of law, irrelevant to the reasonable suspicion analysis, the court also contextualized the factor, distinguishing the fact that Respondent's vehicle was simply registered to an address in a "high crime area" from a situation in which there were unique circumstances attendant to the "high crime area," such as the

individual's presence in a high crime area may, in certain circumstances, give rise to a reasonable suspicion, "where a person lives is an entirely different matter." *Id.* Indeed, this is precisely the type of factor that, absent some constitutional backstop and judicial determination of relevance, may be used to justify a myriad of police activities that are unwarranted and likely to be used as pretext for an unconstitutional search and seizure. As the Court of Appeals recognized, if such a factor were permitted to justify reasonable suspicion, "persons forced to reside in high crime areas for economic reasons (who are frequently members of minority groups) would be compelled to assume a greater risk not only of becoming victims of crimes but also of being victimized by the state's efforts to prevent those crimes – because their constitutional protections against unreasonable intrusions would be significantly reduced." *Id.*

Indeed, while the Government goes to great lengths not to condone intentional discrimination, *Pet.'s Br.* at 29-31, in fact, by logical extension, its argument would allow just that. It is well known that race is often used as a proxy for criminality and a determining factor to arrest, stop or frisk an individual. *See, e.g.*, David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. Pa. J. Const. L. 296, 299-306 (2001); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 265-288 (1999); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth*

fact that the area was isolated and uninhabited and thus not used for any legitimate purpose. *Arvizu*, 232 F.3d at 1250, n.10.

Amendment, 74 N.Y.U. L. Rev. 956, 957-58, nn.1-3 (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 Colum. Hum. Rts. L. Rev. 551, 558-66 (1997). A pernicious practice that seeps into law enforcement determinations via a host of pretextual justifications, racial profiling nonetheless can be curbed by stemming law enforcement officers' ability to rely upon factors that have no probative value or relevance to a reasonable suspicion determination. In this way, the court positively contributes to the evolution of a constitutional standard by which law enforcement knows that it must abide when making reasonable suspicion determinations. The court's efforts to stem at least one such factor should, therefore, be applauded.

Accordingly, the Court of Appeals' decision is an appropriate contribution to Fourth Amendment jurisprudence, and *amici curiae* respectfully urge that this Court uphold the appellate courts' law-making function in this area.

II. THE COURT OF APPEALS' OPINION IS THE UNREMARKABLE APPLICATION OF *DE NOVO* REVIEW TO THE FACTS OF THIS CASE.

The decision of the U.S. Court of Appeals for the Ninth Circuit was a fairly routine application of established case law to a familiar fact pattern. *Amici* respectfully suggest that a judgment that these ten factors did not collectively constitute reasonable suspicion of criminal activity would ordinarily be neither controversial nor worthy of this Court's attention. Nothing about the Court

of Appeals' decision justifies the sweeping and unnecessary intervention into the court's decision-making methodology that the Government seeks.

The constitutional backdrop for the Court of Appeals' decision, specifically the totality of the circumstances reasonable suspicion analysis, is well established. *See Sokolow*, 490 U.S. at 7-8; *Cortez*, 449 U.S. at 417. It is well established, too, that the Court of Appeals exercises *de novo* review over the District Court's determination as to reasonable suspicion. *Ornelas*, 517 U.S. at 699.

Here, the Court of Appeals issued a decision which is, simply, an unremarkable *de novo* application of the totality of the circumstances reasonable suspicion test to the facts before it. Specifically, in holding that the facts did not give rise to reasonable suspicion, the Court carefully assessed the relevance of the individual factors in light of the circumstances and context of the case at hand, and determined that certain of those factors had no weight. The court explicitly stated that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis *in this case*, and that the others, singly and collectively, are insufficient to give rise to reasonable suspicion." *Arvizu*, 232 F.3d at 1248 (emphasis added).

The court's consideration of each of the factors at issue was based on its experience with these types of cases and made in the context of this particular set of facts. For example, in considering the factor of Respondent's failure to slow his minivan as it approached the Border Patrol vehicle, the Court of Appeals determined that under the facts of this case, which included the fact

that the officer in question never claimed that Respondent broke any traffic laws or that Respondent drove erratically or evasively, there was no objectively reasonable basis for finding that this factor indicated criminal activity. *Arvizu*, 232 F.3d at 1249. Likewise, in considering the factor of Respondent's failure to acknowledge the law enforcement official, the court determined that there were present no "special circumstances" which would indicate that criminal activity was afoot, and thus, given the facts of this case, this fact, too, failed to support a reasonable suspicion determination. *Id.* at 1249. The additional factors that the court rejected – namely the fact that another minivan, stopped in the past month on the same road, contained marijuana, the fact that the officer did not recognize Respondent's minivan as belonging to a local resident, the fact that Respondent's minivan was registered to an address on a block notorious for smuggling, and the fact that Respondent's children's knees were raised in the back seat – were likewise considered "under the circumstances" to have little or no weight in the reasonable suspicion determination. *Id.* at 1249.

Accordingly, given the circumstances of this case and based on its expertise with these types of cases, the Court of Appeals determined that the factors alleged to give rise to reasonable suspicion did not, in fact, raise such a suspicion and, under the Fourth Amendment, a stop and search based upon those facts was unwarranted and unconstitutional. The court reached its determination through a straightforward application of the totality of the circumstances reasonable suspicion test to the facts of this case, as an appellate court is charged with doing. *Ornelas*, 517 U.S. at 699. Because such an analysis is well

within the province of the reviewing court, and because any restrictions on a court's ability to conduct such an analysis would undercut the established role of appeliate courts in the Fourth Amendment context, *amici curiae* respectfully urge that the Court affirm the judgment of the Court of Appeals.

CONCLUSION

For the foregoing reasons, *amici curiae* National Association of Criminal Defense Lawyers and National Association of Federal Defenders respectfully urge the Court to affirm the ruling below.

Respectfully submitted,

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Dated: August 23, 2001

Aug 23, 2001

Supreme Court, U.S.
AUG

No. 00-1519

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

RALPH ARVIZU,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE DKT LIBERTY PROJECT IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties that threaten the reservation of power to the citizenry that underlies our constitutional system. The DKT Liberty Project is also particularly involved in defending the right to freedom from government restraint and interference, one of the most profound individual liberties and a critical aspect of every American's right (and responsibility) to function as an autonomous and independent individual.

This case implicates the fundamental right of each citizen to be free from government restraint and interference. It also implicates the effects on the citizenry of regular unwarranted governmental intrusion. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Because of The DKT Liberty Project's strong interest in protecting citizens from government overreaching, it is well situated to provide this Court with additional insight into the issues presented in this case.

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The objectively reasonable suspicion standard of *Terry v. Ohio*, 392 U.S. 1 (1968) requires law enforcement officers to have specific and articulable facts to justify a decision to detain – and therefore seize – any person. That requirement, which should roughly predict illegal conduct, and therefore arrest, is critical because it protects the rights of law-abiding citizens to be free from such seizures. Recent data shows, however, that enormous numbers of innocent people are regularly detained by law enforcement. The percentage of *Terry* stops that result in arrests is extremely low, rarely more than five percent, and often substantially less. This data suggests that the *Terry* standard – which is already lower than the probable cause requirement of the Fourth Amendment – must be jealously guarded, and that law enforcement need clearer guidelines as to what constitutes reasonable suspicion.

The stop at issue in this case was not justified, because the specific facts articulated by the agent do not support an objectively reasonable suspicion that illegal conduct was afoot. None of the factors standing alone would justify the stop. And combining them does not, as it did in *Terry*, create any more indicia of illegality than the factors did separately. Thus, this Court should affirm the ruling below that the stop was illegal. In doing so, this Court can give sorely needed guidance to law enforcement agencies as to the limits and proper use of the flexible *Terry* standard.

ARGUMENT

I. AVAILABLE DATA SHOWS THAT, IN PRACTICE, THE BALANCE STRUCK IN *TERRY* NOW TILTS STEEPLY AGAINST INNOCENT CITIZENS.

A. *Terry* Required That Investigative Stops Be As Narrowly Targeted As Possible To Avoid Seizing Innocent Persons.

In *Terry*, this Court held that all investigative stops by law enforcement, no matter how brief, are governed by the Fourth Amendment. The *Terry* standard was not drawn up to shelter the guilty, but rather to protect the rights of the innocent, since the Court recognized that the seizure of any person, even momentarily, was a "substantial interference with liberty and personal security." *Terry*, 392 U.S. at 12. More importantly, the *Terry* Court recognized that if left unchecked by the courts, the regular seizures of innocent persons – even in the good faith attempt to find wrongdoers – posed a threat to society at large. These practices, the Court noted, "inflict great indignity and arouse strong resentment," *id.* at 17, and could even "exacerbate police-community tensions in . . . our Nation's cities." *Id.* at 12.

Compelled by these twin concerns, the *Terry* Court set forth an objective test to govern investigate stops by the police. To ensure that police did not stop everyone routinely, or anyone randomly, *Terry* required law enforcement officers to have a reasonable suspicion based on "specific and articulable facts" that the target of their seizure was involved in criminal activity. *Id.* at 21. *Terry* emphasized that investigative stops could not be justified by "inarticulate hunches" nor mere "good faith on the part of the . . . officer." *Id.* at 22 (internal quotation and

citation omitted). To the contrary, *Terry* held that the investigative stops would be "judged against an objective standard: would the facts available to the officer at the moment of the seizure . . . warrant a man of reasonable caution in the belief that the action taken was warranted?" *Id.* at 21-22 (internal citation omitted).[2]

Since *Terry*, the Court has continued to insist that investigative stops ensnare as few innocent persons as possible. Although the Court has acknowledged that *Terry* stops are not about "hard certainties, but . . . probabilities," *United States v. Cortez*, 449 U.S. 411, 418 (1981), the Court has nevertheless monitored these probabilities closely – and it has set the standard high. For example, in *Reid v. Georgia*, 448 U.S. 438 (1980), the Court rejected a *Terry* search grounded in part on the petitioner's early morning arrival from Fort Lauderdale without luggage because those circumstances "describe a very large category of presumably innocent travelers, who would be subjected to virtually random seizures" if the search in question were upheld. 448 U.S. at 441. And in *Florida v. J.L.*, 529 U.S. 266 (2000), decided just last year, the Court held that an anonymous tip did not justify a *Terry* stop where it contained only the description of a suspect and his location at a bus stop, because, in part, such a rule could cause stops of many innocent people without a reasonable suspicion of illegality. The Court held that the "reasonable suspicion here at issue requires that a tip be reliable in its *assertion of illegality*, not just in its tendency to identify a determinate person." 529 U.S. at 272

[2]It bears repeating that the brief and limited duration and nature of such stops, and the exigencies of the situation that require them, led the Court to apply a lower standard than the probable cause required in the Fourth Amendment. Thus, the *Terry* stop is already in the nature of an exception to the Fourth Amendment, so it should be narrowly construed.

(emphasis added).

More pointedly, this Court has refused to countenance investigative seizures based on factors shared by a large group of people, even when those factors are also shared by a subset of people engaged in criminal conduct. Thus in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Border Patrol argued that it was allowed to stop cars based solely on the occupants' appearance of Mexican ancestry. But despite the fact that the vast majority of illegal aliens at that border were of Mexican ancestry so that Mexican appearance was a relevant factor, the Court held that Border Patrol "roving patrols" could not stop cars based on that fact alone. *Id.* at 886. The Court so held because "[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proporation of them are aliens." *Id.* at 886-87 & n.11. Concluding that the rule proposed by the Border Patrol would "subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of [the] Border Patrol," *id.* at 882, the Court held that even where aliens made up as much as 20.4 percent of the population at the time, that figure was not high enough to justify a *Terry* stop on the basis of Mexican ancestry alone.

In short, this Court has consistently required *Terry* stops to be justified by articulable facts that distinguish a particular suspect from a larger pool of innocent persons who share common factors.

B. Contrary To The Fourth Amendment, A High Percentage Of Innocent Persons Are Ensnared In Investigative Stops By Law Enforcement.

One measure of whether *Terry* stops generally are achieving their goal is the percentage of those stops that actually result in arrest, since, writ large, "reasonable suspicion" is intended to predict illegality. Thus, the percentage of arrests from stops based on reasonable suspicion should be higher than the percentage of arrests from random stops. Moreover, if a large percentage of persons stopped are not engaged in criminal activity justifying an arrest, that fact suggests some problem with the reasonable suspicion criteria in use.

Though empirical evidence on how often *Terry* stops result in arrests is rare, some data is quite recently available. This evidence has come from several sources. On the federal level, spurred by public interest in the "racial profiling" issue, government agencies have begun to assemble data relating to law enforcement contact with citizens, including information about the background of the person detained and the outcome of each incident.[3] On the state and local levels, approximately 400 police agencies nationwide have begun to collect similar data, and many have started to make this data available to the public. Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, Wash. Post, June 28, 2001, at A1.

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[3]*See* William J. Clinton, *Memorandum on Fairness in Law Enforcement*, 35 Weekly Compilation of Presidential Documents 1067 (June 9, 1999), *available at* http://www.oele.org/fedprof.html (visited Aug. 20, 2001); Dep't of Justice, *Dep't of Justice Proposal Responding to the Executive Memorandum on Fairness in Law Enforcement* (Oct. 8, 1999) *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/remflep.pdf (visited Aug. 20, 2001). The results of this initiative have not yet been released.

Finally, several litigants in civil and criminal actions have obtained valuable and often highly relevant data through discovery.

Though a good deal of data has yet to be published, the available evidence shows troubling trends in law enforcement. In some areas, only two to five percent of *Terry* stops result in an arrest. In other cases, the data reflects an outright disregard for the principles of *Terry*, as suspected lawbreakers are seized and questioned without any pretense of specific or articulable facts. Moreover, mounting evidence suggests that the percentage of *Terry* stops resulting in arrest varies dramatically among racial lines, suggesting that law enforcement officers apply the *Terry* standard differently according to the race of the suspect.

1. Border Patrol

In addition to patrolling the Nation's borders, the Border Patrol has statutory authority to seize and take into custody any illegal aliens found up to 100 miles inland. 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(2). Border Patrol seizures conducted within the nation's interior are governed by the Fourth Amendment. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

The Border Patrol has not released statistics on the number of *Terry* stops made by its officers. *Nicacio v. INS*, 595 F. Supp. 19, 23 (E.D. Wash. 1984), *aff'd*, 797 F.2d 700 (9th Cir. 1985), *overruled on other grounds, Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999); *Murillo v. Musegades*, 809 F. Supp. 487, 495 (W.D. Tex. 1992). In fact, partly to remedy that problem, legislation is now pending in Congress that would *require* the federal government to collect data on

traffic stops within 25 miles of the border. *The Traffic Stops Along the Border Statistics Study Act of 2001*, H.R. 1778, 107th Cong. (2001). Until such information is public, however, it is not possible to gauge with certainty how often Border Patrol stops result in arrests. It is true that some Border Patrol officials have estimated in courts that over 90 percent of their automobile stops result in the arrest of illegal aliens. *See, e.g., Nicacio,* 595 F. Supp. at 23. However, the Border Patrol has yet to offer any objective documentation of this claim and the available data suggests that the actual percentage is far lower.[4]

The only actual analysis of Border Patrol automobile stops was compiled by the plaintiffs in a class-action lawsuit brought recently in Tucson, Arizona, on behalf of all Hispanics who drive on the highways of Southern Arizona. *Hodgers-Durgin v. De La Vina*, No. Civ. 95-029 TUC-JMR (D. Ariz.). Through discovery, the plaintiffs obtained the Border Patrol radio logs for the Tucson sector for the period June 1994 through December 1995.[5] The plaintiffs' analysis of these radio logs, using the codes provided to them by the Border Patrol, revealed that out of a total of 534 vehicle stops made by roving patrols, only 14 resulted in arrests – less than three percent of the total. *Pl. Mot. to Reconsider Class Certification* 45 (D. Ariz. filed

[4]Moreover, even when the Border Patrol has presented statistics on vehicle stops, some courts have not deemed it reliable. *See, e.g., Murillo*, 809 F. Supp. at 495 ("The record produced by the El Paso Border Patrol and the testimony given by [the local Border Patrol sector chief] contains at least questionable, possibly inflated, and apparently inconsistent statistics.").

[5]Interestingly, the Tucson sector includes the location of the stop challenged in this case.

Oct. 1996) (attached at Appendix A).[6]

An explanation for this extremely low correlation between investigative stops and arrests can be found in the cavalier attitude of many Border Patrol agents and supervisors, as chronicled in numerous court opinions. For example, in *Mendoza v. INS*, 559 F. Supp. 842 (W.D. Tex. 1982), the Court found that Immigration & Naturalization Service agents participated in a "dragnet" series of bar raids in the El Paso area in search of illegal aliens. The raids involved bursting into the bars (known to be frequented by people of Mexican descent), stopping the music, barring and guarding the doors, stopping bar service, lining up the patrons, randomly interviewing patrons (concentrating on those of Mexican descent), and searching private areas of the bar *Id.* at 845. The court declared it was "offensive to the Court's sense of justice that any one of us could have been caught in one of the indiscriminately thrown dragnets in El Paso on January 29 while enjoying mariachi music and tostados." *Id.* at 848. Accordingly, the Court enjoined INS (which included the Border Patrol) from stopping persons without more than a suspicion based on their Hispanic appearance. But ten years later, the same judge on the same court recounted a long and sordid history of further Border Patrol conduct and concluded (again) that Hispanic residents in El Paso had been "based on their Hispanic appearance, repeatedly stopped, questioned, detained, frisked, searched, and arrested without cause and have been subjected to verbal and physical abuse." *Murillo,* 809 F. Supp. at 498. Most surprising was the statement of the Section Chief of the El Paso Border Patrol that although he had "heard"

[6]Because the lawsuit was eventually dismissed on standing grounds, the Court never addressed the merits of the case. *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

of the *Mendoza* injunction issued against his agency, he had neither read the injunction or the opinion, nor done anything to implement them or monitor compliance. *Id.* at 495.

The Texas agents are not alone. In *Nicacio,* the district court held that the Border Patrol in Washington so regularly stopped vehicles and questioned the occupants without the required articulable facts to form a reasonable suspicion as to constitute a *practice*. *Nicacio*, 595 F. Supp. at 23. The court ordered a halt to this practice and directed the Border Patrol to document in writing all investigative stops and to maintain that documentation for at least three years. *Id.* at 26. The federal circuit court of appeals affirmed those findings and rulings. *Nicacio v. INS*, 797 F.2d 700 (9th Cir. 1985), *overruled in part on other grounds*, *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999). More recently, the Attorney General of Arizona issued a report which documented INS and Border Patrol participation in a five-day dragnet for illegal aliens in Chandler, Arizona. Office of the Attorney General of Arizona, *Results of the Chandler Survey* (1997). The report concluded that the Border Patrol made "numerous" stops of citizens and legal residents without reasonable suspicion. *Id.* at 31-32.

2. Drug Enforcement Agency

The Drug Enforcement Agency runs drug interdiction efforts at many of the nation's airports, relying largely on a "drug courier profile" developed in the 1970's by DEA agent Paul Markonni of Detroit. *See generally* Charles L. Becton, *The Drug Courier Profile: 'All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye,'* 65 N.C. L. Rev. 417, 419 (1987). The DEA does not keep comprehensive statistics on the effectiveness of the drug courier profile program. *Id.* at 418 n.4. In some cases the DEA

has presented data on the number of arrests made, or the percentage of searches that yielded arrests, but, like the Border Patrol, the DEA has not made available documentation of the number of people temporarily detained but not subsequently searched or arrested. *Id.*; *see also United States v. Place*, 660 F.2d 44, 48-49 (2d Cir. 1981), *aff'd*, 462 U.S. 696 (1983); *United States v. Vasquez*, 612 F.2d 1338, 1352 & n.8 (2d Cir. 1979) (Oakes, J. dissenting).

Nonetheless, cases reported to date strongly suggest that, like the Border Patrol, the number of arrests resulting from DEA *Terry* stops is extremely low. For example, in *United States v. Hooper*, 935 F.2d 484 (2d Cir. 1991), DEA agents testified that out of the 600 people they detained at the Greater Buffalo International Airport, they arrested only ten, for an arrest rate of 1.6 percent. *Id.* at 500 (Pratt, J., dissenting). Similarly, in *United States v. Moya*, 561 F. Supp. 1 (N.D. Ill. 1981), *aff'd*, 704 F.2d 337 (7th Cir. 1983), *vacated on other grounds*, 464 U.S. 979 (1983), another DEA agent testified that he routinely detained two to three people per day at Chicago's O'Hare Airport on the basis of his suspicions, but that these stops had led to only 70 to 80 arrests in three years. 561 F. Supp. at 4. Thus, in only three to five percent of these investigative seizures did the "reasonable suspicion" predict criminal conduct. *But see* Zedlewski, *The DEA Airport Surveillance Program: An Analysis of Agent Activities* (1984) (a National Institute of Justice study in which DEA agents reported over eight weeks that 33 percent of stops resulted in arrests), *cited in* John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials* 226-27 (1985).

3. State And Local Law Enforcement

Of the numerous jurisdictions presently compiling data on police stops, many focus on the arrest rates for nonconsensual searches or routine traffic stops, as opposed to *Terry* stops ostensibly founded on reasonable suspicion. Nonetheless, data that has emerged to date sheds considerable light on law enforcement's current practices under *Terry*.

The most important study to date is a recent effort by the Attorney General of New York to document and evaluate "stop and frisk" activities in New York City. *See* Office of the Attorney General of New York, *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (1999), *available at* http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf (visited Aug. 20, 2001) (*NYC Stop & Frisk Report*). That report shows that only 11 percent of New York City's stops and frisks between January 1998 and March 1999 resulted in an arrest. *Id.* at 111-12. Even more disturbing, the Attorney General's evaluation of the forms that police are required to fill out after each *Terry* stop revealed that a full 23.5 percent failed to contain sufficient information to determine whether reasonable suspicion had been met, while another 15.4 percent stated facts that, on their face, were not adequate to constitute reasonable suspicion. *Id.* at 160-63.

In another study reported by the American Civil Liberties Union, the author examined 34,000 highway stops by the California Highway Patrol in 1997 and found that only two percent resulted in arrests. David Harris, *Driving While Black: Racial Profiling On Our Nation's Highways* (ACLU Special Report, June 1999), *available at* http://www.aclu.org/profiling/report (visited Aug. 20, 2001).

C. The Effects Of Unwarranted Stops Are Lasting And Dangerous.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). Because of this truth, the frequent unjustified seizures of innocent persons are not merely an inconvenience to the person seized – they endanger the rule of law. The *Terry* Court recognized the "serious intrusion" of such seizures "which may inflict great indignity and arouse strong resentment." *Terry*, 392 U.S. at 17. And it specifically looked to the community's reaction to such seizures to gauge their reasonableness: "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." *Id.* at 17 & n.14.

One need not look far to see evidence of that community resentment today. Fear, anger and hopelessness – and in many cases, all three – are the predominant reactions among those who have been the victims of arbitrary and suspicionless *Terry* stops. In the case of suspected illegal aliens, especially children, fear is the predominant reaction. The Arizona Attorney General documented these effects in his 1997 report about Border Patrol abuses. *See Results of the Chandler Survey, supra,* at 3 (testimony of Catalina Veloz, a United States citizen, describing how her five year old son now cries when he sees police officers on the street); *id.* at 19 (testimony of "Q", whose daughters were wrongfully harassed by Border Patrol agents, describing how her daughters now hide when there is a knock on the door because "maybe it is the police"). *See also Murillo*, 809 F. Supp. at 493 (finding that plaintiffs "have been insulted, humiliated, degraded and embarrassed" by

their unlawful seizures by the Border Patrol and they are "afraid they will be stopped, questioned, detained, frisked, arrested, searched, and physically and verbally abused by Defendants in the future without legal cause").

For other victims of police misconduct, distrust and anger are the more logical result. *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265, 273-74 (1999) (interview with Kevin, an executive in his thirties, who says "When I see cops today, I don't feel like I'm protected . . . I do not feel safe around cops"); *id.* at 272 (interview with James, also an executive: "I'm not trying to bother nobody. But yet I got a cop pull me over says I'm weaving in the road. And I just came from a friend's house, no alcohol, no nothing. It just makes you wonder – was it just because I'm black?"). *See also NYC Stop & Frisk Report, supra*, at 79 (narrative of Ms. Davis, 54-year-old African American detained and patted down without apparent grounds by New York City police: "I was shocked and humiliated at being treated like a common criminal . . . I don't trust police officers.").

Society is surely burdened when citizens view law enforcement with the fear and distrust like that expressed by the victims above. But these emotions, as strong as they are, may not reveal the full story. The greatest harm is not anger and mistrust, but another sentiment commonly felt by victims of police abuse: the sense of futility. As the *Murillo* court put it about the repeatedly groundless Border Patrol detentions, "victims begrudgingly accept this type of abusive law enforcement action as a way of life." 809 F. Supp. at 496. In a police state, this attitude may be predictable, and even useful as it serves to shore up police power. But few beliefs, if widely held, could be so harmful to a free society which depends for

its order and restraint upon its citizens' respect for the rule of law.

II. APPROVING THE STOP IN THIS CASE WOULD LOWER THE *TERRY* STANDARD.

A. Absent Some Indicia Of Illegality, This Court Has Never Approved A *Terry* Stop On The Basis Of Wholly Suspicionless Individual Factors.

This Court has repeatedly held that the reasonable suspicion inquiry must take into account "the totality of the circumstances." *E.g. Cortez*, 449 U.S. at 417-18; *United States v. Sokolow*, 490 U.S. 1, 8 (1989). Taken at face value, this proposition is unremarkable: after all, factors which may appear irrelevant in one context may be of considerable relevance in another setting. Wearing a ski mask may not be suspicious conduct at a winter lodge in Aspen, but it takes on a somewhat different connotation at a bank branch in Miami.

But the "totality of the circumstances" test has never been a license to aggregate unrelated factors with little or no probative value into reasonable suspicion. *See, e.g., Reid*, 448 U.S. at 441 (facts that petitioner arrived from Fort Lauderdale, arrived early in the morning, carried no luggage, and appeared to be trying to conceal fact of travel with a companion were not sufficient to amount to reasonable suspicion). To the contrary, the Court insists on both "quantity *and* quality." *Alabama v. White*, 496 U.S. 325, 330 (1990) (emphasis added). The Court has recognized that even factors which, on their own, appear to have little or no bearing on the likelihood that criminal conduct

is afoot, might help in forming a reasonable suspicion.[7] But it has taken these "suspicionless" factors into the mix only in circumstances where something other than mere quantity of such factors creates the suspicion.

These cases have tended to present themselves in three different variants. One class of cases in which the Court has weighed suspicionless factors are those in which a *Terry* stop is ultimately justified on the basis of other, more probative considerations. *Sokolow* is a good example. There, DEA agents based their suspicions of Sokolow in part on the facts that he was traveling to Miami and that he did not check his baggage, two suspicionless factors that are reputedly characteristics of drug couriers. However, the DEA was initially drawn to Sokolow not merely by these factors, but because he had purchased a $2,100 ticket with $20 bills and he was traveling under an alias – behavior that the Court had no difficulty in terming "out of the ordinary." *Solokow*, 490 U.S. at 8. The fact that Sokolow was traveling to Miami and checked no bags was not irrelevant – had he checked his luggage to Des Moines, the agents may well have ignored him – but they became germane to the reasonable suspicion analysis only in the presence of two additional, significantly more probative factors. *See also Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion) (similar facts).

A similar analysis applies to several other *Terry* stops approved by the Court. For example, in *Florida v. Rodriguez*,

[7]These factors might also be referred to as "innocent" factors, in the sense that they denote conduct that innocent people are equally likely to engage in. However, the Court has rightly made clear that "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Sokolow*, 490 U.S. at 10 (internal citation omitted).

469 U.S. 1 (1989), the Court mentioned the respondent's apparently unorthodox bodily movements, but reasonable suspicion plainly flowed from the fact that these bodily movements took place while the Respondent was attempting to flee from an officer. *See also Illinois v. Wardlow*, 528 U.S. 119, 125-26 (2000) (Respondent's presence in area of heavy drug trafficking was of interest, but fact which truly aroused suspicion was his unprovoked flight from police).

In a second class of cases involving suspicionless factors, *Terry* stops have sometimes been justified on the basis of additional, extrinsic evidence from sources other than the subject's conduct. For example, in *Ornelas v. United States*, 517 U.S. 690 (1996), the relatively unremarkable facts that the Petitioner drove an old two-door General Motors car with California plates and checked into a Detroit motel at 4 a.m. were secondary to what effectively distinguished him from other ordinary travelers driving old cars and checking into motels late: his identification in a federal database of known and suspected drug dealers. *Id.* at 691-92. Similarly, in cases involving informants, police have extrinsic evidence to justify the stop. In *Adams v. Williams*, 407 U.S. 143 (1972) and *White*, for example, neither suspect exhibited conduct that would, on its own, lead any reasonable observer to suspect that criminal activity was afoot. But where law enforcement observation was supplemented by the contributions of reliable informants or the observed conduct was consistent with the informant information, the stops were justified. 407 U.S. at 146-47; *White*, 496 U.S. at 329-30. *See also Cortez*, 449 U.S. at 418-21 (stop of pickup truck justified where officers had earlier predicted, based on careful investigation of desert footprints and other clues, that vehicle of precisely that type would likely be transporting illegal aliens at precisely that location and precisely that time).

The third class of suspicionless factor cases is represented by the *Terry* decision itself. In that case, a police officer watched two men on a street corner proceed alternately back and forth along an identical route. Each paused to stare into the same shop window, and then returned to the corner to confer with the other. The men repeated this cycle a dozen time each (for a total of 24 trips to the store window) over a period of 10 to 12 minutes, and then conferred briefly with a third man. Although each act of strolling past a store window and looking in may have been innocent on its own, the 24 repetitions of that act take it out of the category of activities routinely engaged in by many innocent people. Thus, the peculiar *repetition* of what would otherwise be suspicionless conduct provided the basis for reasonable suspicion. *Terry*, 392 U.S. at 22-23. The Court had no trouble finding that the suspects' apparent stakeout of this store constituted "unusual" conduct warranting further investigation by law enforcement. *Id.* at 30.

Thus, this Court has not held that the simple aggregation of several suspicionless factors creates the reasonable suspicion necessary to justify a stop. Without some indicia that the suspicionless factors indicate any illegality, the list of factors is no more than a hunch.

B. In Contrast To Other *Terry* Stops Approved By The Court, The Suspicionless Factors In This Case Are Unaccompanied By Any Indicia Of Illegality.

1. No Significant Degree Of Suspicion Attaches To Any Of The Individual Factors Identified By The District Court.

Contrary to the vast majority of cases in which *Terry* stops have been sustained, this case contains no individual factors

which, when viewed in isolation, could in any way be considered "unusual," *Terry*, 392 U.S. at 30, or "out of the ordinary." *Sokolow*, 490 U.S. at 8. A brief review of the factors relied on by the District Court illustrates that this is so.

a) The use of the road in question. The District Court found that the dirt road on which Respondent traveled is one that could be used by illegal aliens or drug smugglers seeking to avoid a nearby Border Patrol checkpoint. Importantly, however, the District Court did not find that the road had no (or even few) other uses. To the contrary, there were many other uses by both residents of the area and vistors to the several recreation areas. Indeed, as the Circuit Court rightly observed, the roughly 50 or so arrests made by agent Stoddard during his two years with the Border Patrol constituted a mere one percent of the total vehicle traffic on that road. Pet. App. 5a n.5. Moreover, Agent Stoddard offered no testimony on the number of stops he made on that road which did *not* result in an arrest. Tr. 18-76 (J.A. 18-76).

b) The fact that Respondent traveled within one hour of the three p.m. Border Patrol shift change. Though this factor could be consistent with illicit activity, it is equally consistent with the activities of a resident or visitor going about their business in the middle of the day. Indeed, many innocent people were doing exactly that on the day in question. There is simply nothing peculiar about driving between the hours of 2 pm and 4 pm that suggests that the driver is engaged in criminal conduct.

c) The fact that another minivan was found to be carrying drugs in the same area a month earlier. This has absolutely no relevance to the reasonableness of *Agent Stoddard's* suspicions, as he candidly admitted at the suppression hearing that he

suspected the vehicle might be carrying illegal aliens, not drugs. Tr. 68 (J.A. 68). Moreover, one previous event cannot suggest a pattern that would objectively support a reasonable suspicion.

d) The fact that minivans are commonly used by smugglers. Again, while this may be true of smugglers, it is also true of families – a vastly larger subset of the population. Pet. App. 18a.

e) and f) The minivan slowed as it approached the Border Patrol vehicle; the driver appeared to be nervous. As large numbers of innocent drivers take precisely the same actions when encountering law enforcement on the highway, these factors are of hardly any probative value. The District Court itself noted that the nervousness of the driver "doesn't mean [a] whole lot in terms of articulated suspicion." Pet. App. 24a.

g) The fact that Agent Stoddard did not recognize the vehicle. The District Court correctly ascribed little or no value to this factor, noting that "[o]bviously an agent is not going to know all of the vehicles nor all of the visitors that would come into an area." Pet. App. 24a.

h) The fact that the children in the back seats had their knees raised, as if resting on something. The District Court again correctly gave little or no weight to this factor as well. *See* Pet. App. 25a ("Could have been camping equipment, I suppose").

i) The behavior of the children in the back seat. Although the District Court did find "odd" the seemingly mechanical manner in which the children waved to Agent Stoddard, Pet. App. 25a, as the Circuit Court pointed out, there is certainly

nothing unusual about children acting oddly in an automobile. Pet. App. 14a. In any event, even the "odd" waving of children cannot, standing alone or in combination with the others, cause reasonable suspicion of criminal conduct.

j) The vehicle's registration to an address in a neighborhood notorious for smuggling. This, too, has little probative value on its own. To be stopped because one lives in a "bad neighborhood" – essentially a variant of "round up the usual suspects" – is anathema to a free society. Without information about the driver or owner of the car, suspicions about the neighborhood cannot support a seizure. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (fact that appellant was in neighborhood frequented by drug users, without more, not enough to sustain *Terry* stop).

2. Combining The Factors Does Not Make Them More Suspicious.

In its opening brief, the Government contends that even if none of the various factors identified by the District Court are sufficient to justify this stop on their own, reasonable suspicion may nonetheless be found based on the totality of the circumstances. Gov't Br. at 31-35. But this case is unlike any of the others in which the Court has weighed suspicionless factors under the totality of the circumstances test.

First, it is wholly distinguishable from those cases in which the Court used suspicionless factors to "confirm" conclusions that a *Terry* stop was warranted – conclusions that were invariably based on some kind of objectively peculiar conduct by the suspect in question. *See, e.g., Sokolow*, 490 U.S. at 8 (paying for an airplane ticket with cash; traveling under an alias); *Wardlow*, 528 U.S. at 125-26 (unprovoked flight). Here,

the record contains nothing more than a compilation of unremarkable actions by Respondent, actions that are equally consistent with innocent behavior. There is simply nothing "out of the ordinary," *Sokolow*, 490 U.S. at 8, about any of Respondent's actions that the other factors then confirm as suspicious.

Second, there is no extrinsic evidence from other sources that justifies this stop. No informant or tipster alerted Agent Stoddard to probable alien trafficking that day, much less identified Mr. Arvizu as a suspect. And nothing in the record reflects that Agent Stoddard had information derived from previous investigative work that would lead him to target Respondent at that particular location on that particular day.

Finally, this case is a far cry from *Terry* itself. In *Terry*, of course, actions that were each unremarkable on their own nevertheless suggested, in their totality, that criminal conduct was afoot. *Terry*, 392 U.S. at 22-23. But the reasonable suspicion arose from the highly unusual *repetition* of that otherwise unremarkable conduct – 24 trips to look in a store window. Here, there is simply no unusual factor at all – only an aggregation of factors that are each separately, *and together*, equally consistent with innocent conduct. A reasonable person aware of Border Patrol shift changes and the minivan preferences of smugglers who saw Mr. Arvizu drive past in his minivan with his waving children in the midafternoon on a holiday would not immediately – indeed, not ever – reasonably suspect him of criminal conduct. Thus, aggregating the suspicionless factors here yields no more than the sum of the parts. And the sum of various unrelated factors with little or no relevance to reasonable suspicion or to each other is simply little or no relevance. It is not reasonable suspicion.

III. DISAPPROVING THE STOP WOULD SEND A CLEAR MESSAGE TO LAW ENFORCEMENT THAT STRINGING SUSPICIONLESS FACTORS TOGETHER WITHOUT SOME INDEPENDENT INDICIA OF ILLEGALITY DOES NOT CREATE A REASONABLE SUSPICION JUSTIFYING A *TERRY* STOP.

The data presented here, much of which was not available even a few short years ago, puts into stark relief the precarious balance between the Fourth Amendment rights of law-abiding citizens and the reach of vigorous and effective law enforcement. Indeed, it illustrates the vulnerability of our constitutional rights, and the need for constant attendance to them.

It is axiomatic, of course, that each case in this Court is evaluated on its own facts. But "[t]he Fourth Amendment . . . must not be read in a vacuum." *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973). Here, the data showing the larger picture of how law enforcement officers practice their *Terry* obligations is instructive. Innocent people (often poor or otherwise vulnerable) who have been stopped, questioned, and possibly harassed are unlikely to complain about this police conduct to the only logical place – the police department. Further, seeking redress through litigation for the constitutional injury is expensive and difficult. Thus, the only practical control on this conduct may be the courts. "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry,* 392 U.S. at 12. And if the courts give too much deference to "police experience and expertise," *e.g. Ornelas*, 517 U.S. at 699, while relying too lightly on the reasonable person standard of *Terry*, then there

are little controls at all.

This case presents two opportunities for the Court to shape the conduct of law enforcement in *Terry* stops. First, it can make explicit what has been implicit in the cases to date: that absent some independent indicia of illegality, a collection of suspicionless factors may not be strung together to justify a *Terry* stop. Such a rule would reassure a doubting public that law enforcement officers may not violate Fourth Amendment rights with impunity. Equally important, this Court can give clear guidance to law enforcement that sorely needs it. Like the Section Chief of the Border Patrol in El Paso who had not read an injunction binding his agency, the Government appears to believe it is unreasonable to expect police officers to keep up with what the courts say is reasonable suspicion. *See* Gov't Br. at 23-24. But we are not so cynical. In fact, conscientious officers and the superiors who train and supervise them can and do respond to developments in the law – indeed, it is their business to do so. If this Court provides guidance as to what kinds of factors do or do not provide a basis for reasonable suspicion, it can do much to lessen the tensions caused by repeated stops without reasonable suspicion. Though the flexibility inherent in the reasonable suspicion standard is important, so that officers can deal with the wide variety of street encounters they have, so is clear guidance from this Court as to the limits and proper use of that flexibility.

Second, the Court can encourage law enforcement agencies to evaluate what conduct is truly probative of unlawful activity. With the proper impetus from this Court, law enforcement can dramatically improve both their respect for constitutional rights and their effectiveness in enforcing the law. The recent experience of the Customs Service is instructive. Prior to 1999, only three percent of Customs stop and frisks resulted in

arrests. U.S. Gen. Acct. Off., *U.S. Customs Service: Better Targeting of Airline Passengers for Personal Searches Could Produce Better Results* 2 (March 2000). In addition, the agency was also facing considerable public concern over allegations of racial profiling. *See generally* Montgomery, *supra*. In a systematic review of the bases for their agents' stops, the Customs Service eliminated a list of some 80 factors that had previously been used to justify such searches, including factors such as passengers that were too cooperative, passengers that were too calm, and passengers who were wearing sunglasses or bulky clothing. *Id.* As a result, the number of searches declined by more than 75 percent – while the percentage of arrests flowing from the stops that did occur increased by 300 percent. *Id.*

To be sure, the Court cannot insist on perfection when it comes to investigative stops. *Terry* stops will never be about "hard certainties, but probabilities." *Cortez*, 449 U.S. at 318. No hard and fast rule will ever be able to comprehend "the protean variety of the street encounter." *Terry*, 392 U.S. at 15. But where seizures are repeatedly based on very low probabilities of criminal conduct, resulting in frequent seizures of innocent persons, the level of reasonable suspicion required to justify a stop must be carefully examined and made clear to law enforcement. And where law enforcement can do better, it must. The Court can hardly demand less.

CONCLUSION

Because the Border Patrol stop was not justified by specific and articulable facts supporting an objectively reasonable suspicion that Mr. Arvizu was engaged in criminal conduct, it violated the Fourth Amendment. Accordingly, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PANCHITA HODGERS DURGIN, et al., Plaintiffs, vs. GUSTAVO DE LA VINA, et al., Defendants.	No. CIV 95-029 TUC-JMR MOTION TO RECONSIDER CLASS CERTIFICATION

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MEMORANDUM OF POINTS AND AUTHORITIES

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7. Radio Logs - Tucson Sector

Plaintiffs' contention that agents in the Tucson and Yuma sectors are engaged in a pattern and practice of violating the Fourth Amendment by detaining night time highway travellers and highway travellers of Hispanic, Latino or Mexican appearance without reasonable suspicion is born out by Defendants' radio logs. Plaintiffs believed that - - if the agents were stopping vehicles on less than reasonable suspicion, the radio logs would

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reflect that in the vast majority of the roving patrol stops, agents would uncover no evidence of violations of the immigration and nationality laws or anti-drug statutes. The assumption is correct.

Plaintiffs have obtained, through discovery, the Border Patrol radio logs for the Tucson Sector for the period June 1994 through December 1995. According to Defendant Sanders, Chief Tucson Sector, the radio logs reflect approximately 60% of the agent's radio transmissions in the Tucson Sector (Depo of Sanders, p.134, 11.7-14). The Tucson Sector logs contain transmissions of agents in the Tucson, Casa Grande, Naco, Ajo, Douglas, and Nogales stations. Plaintiffs were provided the "10" codes allowing an analysis of the radio logs to determine when a Border Patrol agent or agents on roving patrol stopped a motorists and if the stop resulted in an arrest or seizure. The radio logs contained the date and time of transmission, the station and location of the agent as well as an identifier for the agent and his/her vehicle and the reason for the transmission. For the purposes of this motion and because of time constraints, Plaintiffs have only reviewed the radio logs for the periods 10/8/94 thru 10/23/94, 1/1/95 thru 1/31/95, 5/25/95 thru 5/31/95, 9/29/95 thru 9/22/95, during which periods the logs reflect that a total of 534 vehicle stops were made by roving patrols. Of these stops, only 14 resulted in arrests, or less than three percent (3%) of the total.[9]

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[9]See Exhibits 44-49, which contain the "10" codes, a summary of the radio logs, and the radio logs for the period surveyed.

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Plaintiffs expect the ratio of 3 to 100 arrests to stops to persist in their review for trial of the radio logs for the remaining period. The radio logs are strong evidence that Border Patrol agents on roving patrol are engaged in a pattern and practice of drawing on prohibited factors in initiating detentions, targeted mainly at individuals of Latin, Hispanic or Mexican appearance. Were Border Patrol agents relying upon "[r]easonable suspicion . . . founded upon a particularized and objective basis for suspecting the **particular person** stopped of criminal activity." *Rodriguez,* 976 F.2d at 595, it would be reasonable to infer that a much greater percentage of stops would yield results.

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